(21,114.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 711.

EDWARD S. THOMAS, AS TRUSTEE IN BANKRUPTCY OF CHARLES I. LIGHTSTONE, BANKRUPT, APPELLANT,

vs.

SOLOMON M. SUGARMAN.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 15, 1908.

a United States Circuit Court of Appeals for the Second Circuit.

EDWARD S. THOMAS, as Trustee, &c., Complainant-Appellant,
vs.
SOL M. SUGARMAN and CHARLES I. LIGHTSTONE, Defendants-Appellees.

Transcript of Record.

Appeal from the District Court of the United States for the Southern District of New York.

Printed under the Direction of the Clerk.

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Nov. 27, 1906. William Parkin, Clerk.

1 United States District Court, Southern District of New York.

EDWARD S. THOMAS, as Trustee in Bankruptcy of Charles I. Lightstone, Complainant,
against
SOL M. SUGARMAN and CHARLES I. LIGHTSTONE, Defendants.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The complainant above named, a citizen of the United States and a resident of the State of New York, by James, Schell & Elkus, his attorneys, complains of the above-named defendants, residents of the State of New York and of the Southern District of New York, and respectfully alleges:

I. That on or about the 25th day of August, 1904, in the District Court of the United States for the Southern District of New York, under and in pursuance to the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcies through the
2 United States," a petition in involuntary bankruptcy was duly filed against the defendant, Charles I. Lightstone (hereinafter designated the Bankrupt), and on or about the 15th day of September, 1904, by decree duly made in said Court and filed in the office of the Clerk thereof, said defendant, Charles I. Lightstone, was duly adjudicated a bankrupt.

II. That said decree referred the proceedings in bankruptcy, in accordance with the provisions of said Act and the rules prescribed by the District Court for the Southern District of New York, to the Honorable Peter B. Olney, one of the Referees in Bankrupty for the Southern District of New York.

III. That thereafter, in due course of such proceedings, on or about the 25th day of November, 1904, the complainant was duly elected Trustee in Bankruptcy of the estate of the said bankrupt,

and an order was duly made approving said election and approving the bond filed by said complainant; that complainant has been and since that time is acting as such duly qualified Trustee.

IV. That on or about the 9th day of August, 1904, an agreement was entered into between the defendant, Charles I. Lightstone, the Union Banking Company and the defendant, Sol M. Sugarman, who did and still does business, as complainant is informed and verily believes, as the Union Banking Company, a copy of which contract is hereunto annexed and marked Exhibit A and made a part hereof.

V. That in pursuance of said contract the said Bankrupt transferred certain outstanding accounts and bills receivable, amounting, as your complainant is informed and verily believes, to the
3 sum of approximately Forty-seven Thousand, One Hundred and Ninety-seven and 61/100 Dollars ($47,197.61), to the defendant, Sugarman.

VI. That the defendant, Sugarman, has collected and received all or a large portion of said accounts and bills receivable. Your complainant is ignorant as to the exact amount so collected and received by said Sugarman.

VII. That in pursuance to said contract hereto annexed and marked Exhibit A, and in pretended consideration of the transfer and assignment of the said outstanding accounts and bills receivable, the defendant Sugarman drew checks to the order of the bankrupt amounting to the sum of Thirty Thousand Dollars ($30,000) by the following payments, to wit:

August 9, 1904, the sum of Five Thousand Dollars ($5,000).
August 18, 1904, the sum of Ten Thousand Dollars ($10,000).
August 23, 1904, the sum of Ten Thousand Dollars ($10,000).
August 24, 1904, the sum of Five Thousand Dollars ($5,000).

VIII. That said transfers of said accounts and bills receivable were made by said bankrupt within four months preceding the filing of the petition in bankruptcy above referred to, and while said bankrupt was insolvent and knew himself to be such, as complainant is informed and verily believes.

IX. That said transfers so made were made with the intent on the part of the said bankrupt thereby to hinder, delay and defraud his creditors and in pursuance of a fraudulent device and
4 scheme on his part thereby to hinder, delay and defraud his creditors, as complainant is informed and verily believes.

X. That said defendant, Sugarman, gave no present fair consideration for the said transfers and assignments of said outstanding accounts and bills receivable, and was not a purchaser in good faith of said outstanding accounts and bills receivable, as complainant is informed and verily believes.

XI. That prior to and up to the time of said bankruptcy proceedings, said defendant, Sugarman, gave no notice to any of the persons, firms, or corporations owing said outstanding accounts and bills receivable of the fact of said transfer and assignment of said outstanding accounts and bills receivable to him, the said defendant Sugarman.

XII. That thereby the said defendant, Sugarman, willfully, and with fraudulent intent, left it in the power of said Bankrupt to transfer said outstanding accounts and bills receivable; that said outstanding accounts and bills receivable were thereby such property as the Bankrupt could transfer up to and prior to the time of the filing of the involuntary petition, as complainant is informed and verily believes.

XIII. That at all times when said transfers were made, the total property and assets of said Bankrupt, at a fair valuation—exclusive of any property transferred by said bankrupt with intent to hinder, delay, and defraud his creditors—were insufficient in amount to pay the debts of said Bankrupt, and that the debts of said Bankrupt at all such times exceeded in amount the total of such assets
5 by over Thirty Thousand Dollars ($30,000), as your petitioner is informed and verily believes.

XIV. That the said transfer of the said outstanding accounts and bills receivable and the said contract set forth in Schedule A were part and parcel of a fraudulent scheme and conspiracy entered into between the defendants, with the intent on the part of them and both of them to hinder, delay, and defraud the creditors of the said Bankrupt, and the said Sugerman had full knowledge of the fraudulent intent and of the insolvent condition of the said Bankrupt, as complainant is informed and verily believes.

XV. That as a part of said fraudulent intent on the part of said Bankrupt to hinder, delay and defraud his creditors, and particularly to hinder, delay and defraud his creditors by obtaining moneys on the transfer of said outstanding accounts, said Bankrupt obtained large quantities of merchandise from various creditors, which merchandise was sold by said defendant, Lightstone, and the accounts and bills receivable created by said sales were the accounts and bills receivable so transferred to the defendant, Sugarman; that as a part of said fraudulent scheme, said Bankrupt made various representations to his creditors as to his assets and liabilities, which, as your complainant is informed and verily believes, were false and fraudulent, and were known by him to be such, and did perform divers other acts of fraud.

XVI. That the complainant has been duly authorized to institute and prosecute this suit by an order duly made heretofore by the Honorable Peter B. Olney, Referee in Bankruptcy for the Southern District of New York.

6 XVII. That before the filing of the complant herein, the complainant duly demanded of said defendant Sugarman that he reassign to your complainant all said accounts and bills receivable and deliver to him all amounts collected by him, the said Sugarman, on said accounts and bills receivable, and that said defendant, Sugarman, has refused and still refuses to comply with said demand.

XVIII. That at the time when said involuntary petition in bankruptcy was filed, an order was made enjoining all creditors and other persons from proceeding against the said Bankrupt, and that said injunction is still in force and effect.

Wherefore the complaint demands judgment against the defendants decreeing that the said contract and the assignments and transfers of outstanding accounts and bills receivable be adjudged to constitute transfers made for the purpose of hindering, delaying, and defrauding creditors of the said Charles I. Lightstone, and that the same be set aside and declared to be wholly void, and directing the defendants and each of them to reassign to the complainant such of the said outstanding accounts and bills receivable as have not been paid, and that they be decreed to repay to the complainant herein any and all amounts realized from the collection of the said outstanding accounts and bills receivable and account to the plaintiff for same; and for such other and further relief as may be just and proper in the premises.

May it please your Honors to grant unto this complainant a writ of subpœna duly directed to Sol M. Sugarman and Charles I. Lightstone, thereby commanding them at a certain date and under a certain penalty to personally appear before this Honorable Court, and then and there full, true and perfect answer make to all and singular the premises, and further to stand to and perform
7 and abide by such further order, direction or decree as to this Honorable Court shall seem meet.

EDWARD S. THOMAS,
Trustee in Bankruptcy of Charles I. Lightstone, Complainant.

JAMES, SCHELL & ELKUS,
Attorneys for Complainant.

Office and Post Office Address, 50 Pine Street, Borough of Manhattan, City of New York.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Edward S. Thomas, being duly sworn, deposes and says that he is the Trustee in Bankruptcy of Charles I. Lightstone and the complainant herein; that he has read the foregoing complaint and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

EDWARD S. THOMAS.

Sworn to before me this 23rd day of January, 1905.

NATHANIEL WALKOF,
Notary Public (178) *New York County.*

"EXHIBIT A."

Agreement.

This agreement made the 9th day of August, 1904, by and between Charles I. Lightstone, doing business under the firm
8 name and style Chas. I. Lightstone, in the City of New York, of the first part, and the Union Banking Company, of the

same city, of the second part, witnesseth: That the said Charles I. Lightstone, in consideration of moneys to be advanced by the said Union Banking Company, and in further consideration of the covenants on the part of the party of the second part hereinafter contained, doth covenant and agree to and with the said party of the second part, that he will transfer, assign, and set over unto the said party of the second part, Accounts and Bills Receivable aggregating in the sum of One Hundred Thousand Dollars ($100,000.00). And the said Charles I. Lightstone further stipulates and agrees that he, the said party of the first part, will transfer, assign, and set over unto the said party of the second part such aforesaid accounts and bills receivable, to wit: to the amount of One Hundred Thousand Dollars ($100,000.00) between the date of this agreement and February 1st, following. And it is further agreed by the said party of the first part that he well and truly pay unto the said party of the second part, for and in consideration of the services to be rendered by the said party of the second part and of the covenants hereinbefore referred to by th- party of the second part, a commission of 2½% from the aggregate face amount of all such bills as are transferred by the said party of the first part as hereinbefore set forth. And in the event that the said Charles I. Lightstone does not in accordance with this agreement and with the stipulations herein entered into, so transfer, assign, and set over unto the said party of the second part, accounts and bills receivable to the said amount of One Hundred Thousand Dollars ($100,000.00), as above set forth, then he, the said party of the first part, will pay unto the said party of the second part, all such commissions, and

9 the same and in like manner as if he had well and truly and in full accordance with this agreement and all stipulations herein transferred, assigned, and set over accounts and bills receivable to such amount of One Hundred Thousand Dollars ($100,000.00). And the said Union Banking Company, party of the second part, for and in consideration of the covenants of the party of the first part as above set out, doth covenant and agree that, upon performance *of* the said party of the first part of all conditions precedent, to take such accounts and bills receivable for the purposes of collection, as is their custom in such cases to do, the ordinary rules of trading being made part of this agreement, and further stipulate and agree to render such necessary and usual services in the collection of above mentioned accounts and bills receivable as may be essential to the best interests of the said party of the first part.

In witness whereof, we have hereunto set our hands and seals the day and year above written.

(Signed) CHAS. I. LIGHTSTONE. [L. S.]
UNION BANKING CO. [L. S.]

Attest:

MYRON KRIEGER.

10 United States District Court, Southern District of New York.

EDWARD S. THOMAS, as Trustee in Bankruptcy of Charles I. Lightstone, Complainant,
against
SOL M. SUGERMAN and CHARLES I. LIGHTSTONE, Defendants.

The Demurrer of the Above-named Defendant, Solomon M. Sugarman, to the Bill of Complaint of the Aforesaid Edward S. Thomas, as Trustee in Bankruptcy of Charles I. Lightstone.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true, in such manner and form as the same are therein set forth, doth demur to the said bill of complaint.

And for causes of demurrer shows:

1. That said bill of complaint is bad for multifariousness, two different and distinct and independent matters and causes being joined which have no substantial relation to each other, to wit, a cause of action to set aside a transfer as fraudulent brought against this defendant and one Lightstone, under section 70A (4) of the Bankruptcy Act, joined with a cause of action to recover property or its value, under Section 70A (5) and 70 (*e*), not prop-
11 erly concerning or relating to said Lightstone.

2. That there is an illegal and unauthorized joinder of causes of action as aforesaid, one being cognizable in equity and the other at law, triable by jury.

Wherefore and for divers other errors and imperfections appearing in the said bill, this defendant prays the judgment of this honorable Court whether he shall be compelled to make any further or other answer to said bill or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

MAX J. KOHLER,
Solicitor for Defendant, Sol M. Sugerman.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Solomon M. Sugerman, being duly sworn, deposes and says that he is one of the defendants herein and has read the following demurrer; the same is not interposed for purposes of delay.

SOLOMON M. SUGARMAN.

Subscribed and sworn to before me this 26th day of May, 1905.

EDGAR J. KOHLER,
Notary Public (147), *New York County.*

I, Max J. Kohler, hereby certify that I am the solicitor and of counsel for Solomon M. Sugerman, the defendant above named, and that in my opinion the demurrer of the said Solomon M. Sugerman, by him interposed in the above cause, is well founded in point of law, and proper to be filed in the above cause.

MAX J. KOHLER,
Solicitor and of Counsel for Defendant, Sol. M. Sugerman.

12 United States District Court, Southern District of New York.

EDWARD S. THOMAS, as Trustee in Bankruptcy of Charles I. Lightstone, Complainant,
against
SOL M. SUGERMAN and CHARLES I. LIGHTSTONE, Defendants.

A bill of complaint in equity having been filed in the office of the Clerk of this Court by Edward S. Thomas, Trustee in Bankruptcy of Charles I. Lightstone, and a demurrer having been filed to that bill by the defendant, Solomon M. Sugarman, and the issues of law raised by the demurrer of the said Solomon M. Sugarman having come on for a hearing at a Stated Term of this Court, held by the Honorable George C. Holt, one of the Justices thereof, and after hearing Max J. Kohler, attorney for Solomon M. Sugarman, in support of the said demurrer, and James M. Rosenberg, of counsel for the complainant, Edward S. Thomas, in opposition thereto, and after due deliberation having been had thereon, and the Honorable George C. Holt having duly made and filed his decision in writing, directing that judgment be entered overruling the demurrer with costs, with leave to the defendant, Solomon M. Sugarman, to answer within twenty (20) days,

Now, on motion of James, Schell & Elkus, attorneys for Edward S. Thomas, Trustee in Bankruptcy, it is

13 Ordered, adjudged and decreed that the demurrer filed by the defendant Solomon M. Sugarman to the bill in equity of Edward S. Thomas, be and the same hereby is in all respects overruled; and it is further

Ordered, adjudged and decreed that the defendant Solomon M. Sugarman shall have leave to file an answer to the said bill within twenty (20) days after the signing of this judgment, and in case the said Solomon M. Sugarman does not, within twenty (20) days after the signing of this judgment, answer the said bill in equity and pay the costs hereinbefore decreed to the complainant Edward S. Thomas, as Trustee, or his attorneys, that said complainant may take the bill *pro confesso* against the defendant Solomon M. Sugarman for the relief demanded in the bill of complaint; and it is further

Ordered, adjudged and decree- that the defendant Solomon M. Sugarman pay to the complainant Edward S. Thomas, or his attorneys, the sum of twenty-five and 20/100 dollars as costs, the said sum being the amount as adjusted by the Clerk of this Court.

Dated New York, October 12, 1905.

GEO. C. HOLT, *J.*

14 United States District Court, Southern District of New York.

EDWARD S. THOMAS, as Trustee in Bankruptcy of Charles I. Lightstone, Complainant,
against
SOL M. SUGERMAN and CHARLES I. LIGHTSTONE, Defendants.

The Answer of Defendant Solomon M. Sugerman to the Bill of Complaint.

This defendant, saving and reserving unto himself the benefit of all exceptions to the errors and imperfections in said bill contained, for answer to so much thereof as he is advised it is necessary or material for him to answer unto, doth aver and say:

I.—1. That he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs numbered I to III inclusive of said bill of complaint, and, therefore, denies the same, and puts complainant on his proof concerning the same.

2. He admits the allegations of paragraph numbered "IV" of said bill, and admits those of paragraph numbered "V," except that he avers that the amount of the assigned accounts is misstated, it being, as this defendant is informed and verily believes, the sum of forty-seven thousand two hundred and ninety-seven 65/100
15 ($47,297.65) dollars in the aggregate, that sum being the face value of said accounts, and being subject to reduction because of discounts, claims and counterclaims and errors, and various of these accounts being bad debts.

3. This defendant admits the allegations of the bill contained in the paragraph numbered "VI," except that he says that the amount collected by him on said accounts (including returned merchandise, covered by some of said accounts), is the sum of thirty-one thousand five hundred and forty-eight 35/100 dollars ($31,548.35), itemized statement of which he has rendered to the complainant, and of which sum he paid over to the complainant the sum of forty-eight and 35/100 ($48.35), and furthermore delivered to him a duly executed assignment of the uncollected assigned accounts and an unpaid check for two hundred ($200.00) dollars, being a balance due upon the sale of said returned merchandise.

4. This defendant admits the allegations contained in paragraph numbered "VII" of said bill, except that he denies any and all pretense concerning the consideration.

5. Defendant denies all the allegations contained in the paragraphs of the bill of complaint numbered IX, X, XII, XIV and XV, and he avers that he has no knowledge or information sufficient to form a belief as to whether said alleged bankrupt was insolvent and knew himself to be so at the time of said assignments, as averred in paragraph VIII of said bill, and further avers that he has no knowledge or information sufficient to form a belief as to the

averments contained in said bill in paragraphs numbered XI, XIII, XVI and XVIII.

16 II. Further answering and as a separate and independent defense, this defendant reiterates all the allegations hereinbefore made and further avers that in the due course of his business he executed and delivered the agreement set forth as Exhibit "A" of the bill of complaint, that thereafter, on or about the dates specified in paragraph VII thereof, he drew the checks therein set forth in favor of said Lightstone, and that said checks were duly paid by the bank on which they were drawn, and duly charged against this defendant's account; that said checks, aggregating the sum of $30,000.00 were loans made by this defendant to said Lightstone on the security of the assigned accounts hereinbefore referred to, each of which was duly in writing assigned by him to this defendant, and said Lightstone's estate was thereby enriched by said payments; that this defendant notified complainant that he would exact only the sum of fifteen hundred dollars as compensation to himself under said contract, and upon the collection of a sum sufficient to reimburse defendant for said loans and said sum of fifteen hundred dollars, defendant paid and delivered the surplus collected by him to complainant and assigned to him the uncollected accounts as hereinbefore set forth.

III. Further answering and as a separate and independent defense, this defendant reiterates all the allegations hereinbefore made in this answer and further sets forth that complainant with knowledge of all the facts has ratified and confirmed this defendant's contract and dealings with said Lightstone and is estopped from attacking the same and prosecuting this action, he having secured a judgment and order against said Lightstone from the Honorable Peter B. Olney, referee in bankruptcy in charge, on August 2d, 1905, for the payment by said Lightstone of the sum of

17 $17,500, balance remaining in said bankrupt's hands of the $30,000 referred to in the bill of complaint herein; and in said proceeding this defendant was examined as a witness on behalf of complainant and proved payment to said Lightstone of said sum, which has been charged against said Lightstone, the latter having satisfactorily accounted for his disbursement for his own purposes of the residue of said thirty thousand ($30,000.00) dollars.

And having thus fully made answer to said bill, this defendant prays to be hence dismissed, with costs.

MAX J. KOHLER,
Solicitor for Defendant Sugerman,
42 *Broadway, New York.*

CITY AND COUNTY OF NEW YORK,
Southern District of New York, ss:

Solomon M. Sugerman, being duly sworn, deposes and says: That he has read the foregoing answer and says that the matters and things in said answer contained are true.

SOLOMON M. SUGERMAN.

Subscribed and sworn to before me this 2d day of November, 1905.

[SEAL.] MICHAEL M. CORIN,
Notary Public, N. Y. Co.

18 At a Stated Term of the United States District Court for the Southern District of New York, held at the United States Post Office, in the Court House Building, in the City and County of New York, April 10, 1906.

Present: Honorable George C. Holt, U. S. District Judge.

EDWARD S. THOMAS, as Trustee in Bankruptcy of Charles I. Lightstone, Complainant,
against
SOL M. SUGERMAN and CHARLES I. LIGHTSTONE, Defendants.

A motion made by defendant Sol M. Sugerman for an order amending paragraph numbered "III" of the answer, and for other relief, coming on to be heard, now on motion of Max J. Kohler, solicitor for defendant Sol M. Sugerman,

It is ordered that paragraph III of said answer be and the same is hereby amended so as to read as follows: "This defendant as and for a plea in bar to the bill of complaint herein, reiterating all the allegations hereinbefore made in his said answer, further sets forth that complainant with knowledge of all the facts has ratified and confirmed this defendant's contract and dealings with said Lightstone and is estopped from attacking the same and

19 prosecuting this action, he having secured a judgment and order against said Lightstone from the Honorable Peter B. Olney, Referee in Bankruptcy in charge, on August 2d, 1905, for the payment by said Lightstone of the sum of $17,500, balance remaining in said bankrupt's hands of the $30,000 referred to in the bill of complaint herein; and in said proceeding this defendant was examined as a witness on behalf of complainant, and proved payment to said Lightstone of said sum, which has been charged against said Lightstone, the latter having satisfactorily accounted for his disbursement for his own purposes of the residue of said $30,000, which order was duly affirmed by the United States District Court for the Southern District of New York, on or about December 1st, 1905, on petition to review said determination of the referee.

All of which matters and things defendant doth aver to be true, and pleads the same in bar of complainant's said bill, and prays judgment of the Court whether he will be compelled to further answer said bill, and prays to be hence dismissed with costs."

And it is further ordered on said defendant Sugerman's application that his prayer for judgment in the motion papers herein be and the same is hereby withdrawn without prejudice to a further application for such or similar relief.

Enter.

____ ____,
U. S. District Judge.

Entry of the above order is hereby consented to.

JAMES, SCHELL & ELKUS,
Solicitors for Complainant.

I, Max J. Kohler, counsel for defendant Sugerman in the
20 above cause, hereby certify that the foregoing plea of the bill of complaint is in my opinion well founded in law.

Dated New York, April 9th, 1906.

MAX J. KOHLER.

In the District Court of the United States for the Southern District of New York.

In the Matter of CHARLES I. LIGHTSTONE, Bankrupt.

Upon the annexed petition of Edward S. Thomas and upon the petition in bankruptcy, the adjudication, the schedules in bankruptcy and the testimony specifically mentioned in the annexed petition of Edward S. Thomas, and upon all the proceedings heretofore had herein, it is hereby

Ordered, that Charles I. Lightstone, above named, appear before me at my office, No. 68 William street, in the Borough of Manhattan, City of New York, on the 21st day of January, 1905, at 10 o'clock in the forenoon, and then and there show cause, if any you have, why the prayer of the annexed petition should not be granted.

Dated New York, January 12th, 1905.

PETER B. OLNEY, *Referee.*

21 In the District Court of the United States for the Southern District of New York.

In the Matter of CHARLES I. LIGHTSTONE, Bankrupt.

To the Honorable District Court of the United States for the Southern District of New York:

The petition of Edward S. Thomas respectfully shows: That on the 25th day of August, 1904, a petition in due form for the involuntary bankruptcy of Charles I. Lightstone above named was duly filed and on the same day your petitioner was duly appointed temporary receiver of the said bankrupt, and thereafter such further proceedings were had that said Charles I. Lightstone was duly adjudicated a bankrupt and a first meeting of creditors thereafter regularly had and your petitioner was duly elected trustee of said Charles I. Lightstone, and your petitioner duly accepted said trust, duly qualified and ever since has been and now is acting as said trustee.

Your petitioner further shows that on the 2d day of November, 1904, the bankrupt filed schedules of his assets and liabilities in due form in the office of the Clerk of this court; and your petitioner further shows that Charles I. Lightstone, the bankrupt above
22 named, was examined under oath, in due form, before Alexander Gilchrist, Esq., United States Commissioner, on the fol-

lowing dates, to wit: September 13th, September 15th and October 11th, 1904; and that such testimony has been signed and sworn to and is a part of the records of this proceeding, and that the bankrupt was also sworn and examined before Peter B. Olney, Esq., Referee in Bankruptcy, at his office on the 6th day of December, 1904, and was thereafter further examined by consent at an adjourned hearing of the first meeting of creditors at the office of Black, Olcott, Gruber & Bonynge, on December 17th, 1904, and that such examinations are in due form and are a part of the records of this bankruptcy proceeding and from the said examination and from the schedules in bankruptcy hereinbefore mentioned the following facts appear, and your petitioners allege- them upon information and belief:

That within a period of four months next immediately preceding August 25th, 1904, the date upon which the involuntary petition was filed, Charles I. Lightstone, the bankrupt herein, purchased and received merchandise of the invoiced value of $62,984.81, and that within said period he borrowed and received from the following sources the sums of money set opposite thereto:

Mercantile National Bank	$20,000
State Bank	2,000
S. Adler	2,300
I. Roth	2,500

That the said merchandise has not been paid for, nor have the said sums of money borrowed been returned by the bankrupt, making a total liability on August 25, 1904, for merchandise received and money loaned of $89,784.81.

That against this liability the bankrupt's actual assets consisted of a stock of merchandise and fixtures of a value not exceed-
23 ing $10,000; money on deposit in the Mercantile National Bank $767.78; money on deposit in Chemical National Bank, $18.07 and a possible equity in outstanding accounts assigned to S. Sugarman, not exceeding $10,000, so that the deficiency on August 25th, 1904, is $68,998.96.

Your petitioner further shows that on January 2d, 1904, the bankrupt gave the following signed statement to the Mercantile Agencies for the trade in general, showing his condition as of December 31st, 1903, to be as follows:

Mdse.	$44,463.76	
Accts. Rec. Good	23,941.12	
Cash in Bank	6,201.40	
Cash on hand	227.21	
Fix. and Machy	600.00	
		$75,433.49
Liabs. for Mdse	$14,573.40	
Bank Accom	19,500.00	
		34,073.40
		$41,360.09

And the bankrupt swears that such statement was absolutely true and that he investigated it himself. It appears, however, that the bankrupt had a suspense account on his books, in which was carried outstanding accounts of debtors of questionable value. His testimony is that some of these accounts were included in the said statement but not all of them. For the purpose of giving the bankrupt full credit for these questionable accounts receivable from the said statement, after which it will appear that the bankrupt had, on December 31st, 1903, a surplus of at least $17,418.97, which, when added to the deficiency of August 25th, 1904, of $68,998.96, makes a total deficiency to be accounted for amount to $86,427.93, and your petitioner alleges that the bankrupt has not accounted
24 for this deficiency in any credible, probable or reasonable way.

Your petitioner alleges that this stock of merchandise received within the *fourth* months preceding the failure, of over $62,000 was a fresh and merchantable stock of goods and that it was disposed of by the bankrupt at a profit. The bankrupt testified that his goods were marked to sell at a five per cent. profit and that most of them were sold at a profit. Your petitioner alleges that in the twenty-five days of August, 1904, that the bankrupt was in business he sold $38,979.58 worth of merchandise at a profit of not less than four per cent.

Your petitioner shows that in the month of August, 1904, the bankrupt began cashing his outstanding accounts and from that source received the following sums of money set opposite the following dates:

August 9	$5,000
August 18	10,000
August 23	10,000
August 24	5,000
Total	$30,000

Your petitioner further alleges that he received these various sums of money by checks drawn on the Royal Bank of New York City and that on the same day he cashed these checks at the Royal Bank and did not deposit the cash received in his regular bank accounts.

Your petitioner further shows that on August 22d, 1904, three days before the failure of the bankrupt, said bankrupt drew out of the State Bank in cash the sum of $6,500; making total cash withdrawals by this bankrupt in the month of August of $36,500; and your petitioner alleges that the bankrupt has not accounted for these cash withdrawals in any reasonable, probable or credible manner.

Your petitioner shows that the manner in which the bank-
25 rupt attempted to explain this money is as follows: The payment of $5,000 to the State Bank to take up a note discounted by him. The bankrupt should not be entitled to the credit for this because he had previously received the proceeds of the discounted note. That he paid to one Klein, a book-maker, $12,500, to take up a note payable August 24th, 1904, which the bankrupt

had given him as an investment in a book-making scheme. Your petitioner alleges that the entire story of the payment of this $12,500 is pure fiction made out of whole cloth and that the $12,500 represented to be paid to take up the note was, as a matter of fact, kept by the bankrupt for his own use and is now in his possession; and on August — is not worthy of belief and that this $11,300, in- — cash in his pocket and that he lost $7,200 in faro and $4,000 at the horse races.

Your petitioner alleges that this story is untrue and unbelievable taken in connection with the story of the payment of $12,500 to Klein, the bookmaker, is not worthy of belief and that this $11,300 instead of being lost at faro and the races was, at a matter of fact, kept and retained by the bankrupt for his own use and is now being concealed by him.

The bankrupt also testifies that out of this money he gave $1,200 to his wife and $2,250 to his counsel and your petitioner does not question these payments. Giving, however, the bankrupt credit for all these payments, as if they were actually made, the bankrupt fails to account for $9,300 of this money. In the month of August, 1904, the bankrupt received the following sums of money:

Had in Bank	$500
Received from sources outside of Sugarman	21,709
Received from Sugarman	30,000
Proceeds of discounted note	2,000
	$54,209

26 And on the 25th day of August, 1904, the date of his failure, the bankrupt had less than $800 cash in bank.

Your petitioner shows that the expenses of the bankrupt in his business were small and he had suffered no unusual or severe losses in his business, the only losses suffered being small ones such as are incident to every running business and which are more than compensated for in the profit derived upon sales of merchandise. Your petitioner alleges that, even if credit were given to all of the claimed losses by the bankrupt, being $12,500 paid to Klein, $7,200 lost at faro, $4,000 lost at the races, $1,200 paid to his wife, and $2,250 paid to his counsel, making a total of $27,150, there is still $59,377.93 to be accounted for, being the difference between $86,427.93, total deficiency, and $27,150, which deficiency has not been attempted to be accounted for, and your petitioner alleges, upon information and belief, that not only the said sum of $59,377.93 was being concealed on August 25th, 1904, and is now being concealed from your petitioner, but also that the sum of $24,050 in addition thereto, being the sum of $36,500 received in cash in August, less $8,450, credited payments made therefrom, making a total amount that your petitioner claims the bankrupt was concealing from his creditors on August 25th, 1904, and is now being concealed by him of $83,427.93, and your petitioner prays that an order be made directing the bankrupt to appear and show cause why he should

not turn over to your petitioner, as his trustee, said sum of $84,427.93, and why such other and further relief as is proper and just in the premises should not be granted.

EDWARD S. THOMAS, *Petitioner.*

27 UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, ss:

Edward S. Thomas, being duly sworn, deposes and says: That he is the petitioner above named. That he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

EDWARD S. THOMAS.

Sworn to before me this 11th day of January, 1905.
[SEAL.] M. J. SCHOOLBRED,
Notary Public, Kings County (No. 130).

Certificate filed in New York County.

[On Cover.]

CITY AND COUNTY OF NEW YORK, ss:

Edward McInnes, being duly sworn, deposes and says: He is a clerk in the office of Black, Olcott, Gruber & Bonynge, attorneys for receiver herein, and that on the 16th day of January, 1905, he served the within petition and order to show cause on Charles I. Lightstone, at 1887 Seventh avenue, N. Y. City, by handing to and leaving with him personally a true copy of same and at the same time exhibiting to him the referee's signature or within original. He further says he knew the person so served to be the person mentioned in within original as said bankrupt.

EDWARD McINNES.

Sworn to before me this 17th day of January, 1905.
[SEAL.] ROBT. C. TEN EYCK.

(Endorsed:) Petition and Order to Show Cause. Filed, Feb'y 2/05.—P. B. O., Ref.

28 In the District Court of the United States for the Southern District of New York.

In the Matter of CHARLES I. LIGHTSTONE, Bankrupt.

Charles I. Lightstone, the bankrupt above named, answers the petition of the trustee herein as follows:

I. Admits that on August 25, 1904, a petition in involuntary bankruptcy was filed, and on or about the same day, Edward S.

Thomas was appointed receiver of the said bankrupt, and thereafter such further proceedings were had that said Charles I. Lightstone was duly adjudicated a bankrupt, and said Edward S. Thomas was elected trustee and qualified as such trustee. That on November 2, 1904, schedules of the assets and liabilities of the bankrupt were filed in due form in the office of the Clerk of this court, and that said bankrupt was examined before Alexander Gilchrist, Esq., United States Commissioner. That such testimony has been signed and sworn to, and that the bankrupt herein, was also sworn and examined before Peter B. Olney, Esq., Referee in Bankruptcy, at his office, and thereafter at various times was further examined at the office of Messrs. Black, Olcott, Gruber & Bonynge, but for the facts contained in such examination the bankrupt herein begs to refer thereto.

29 II. Admits that he purchased and received merchandise of the invoice value of $62,984.81, and within said period borrowed and received sums of money from various banks and individuals amounting to about $26,800.

III. Admits that he had money on deposit in the Chemical National Bank amounting to $18.07.

IV. Admits that on January 2, 1904, he gave a signed statement to the mercantile agencies, as set forth in said petition.

V. Admits that he had a suspense account on his books.

VI. Admits that he received in August, 1904, in outstanding accounts the sum of $30,000 by check drawn on the Royal Bank of New York City.

VII. Admits that he drew out of the State Bank, in cash, the sum of $6,500.

VIII. Admits that he stated that $5,000 of said moneys taken from the State Bank were used to take up note discounted by him.

IX. Admits that he paid to one client, a book-maker, $12,500 to take up a note payable August 12, 1904, which the bankrupt had given as an investment in a bookmaking scheme.

X. Admits that on August 19th and 20th, he went to Saratoga with $11,300 cash, and that he lost $7,200 in faro and $4,000 at the races.

XI. Admits that he gave $1,200 to his wife and $2,250 to his counsel.

30 XII. Admits that he received certain sums of money in August, 1904, about as follows: About $54,209, in which, however, is included the moneys received from Sugarman on outstanding accounts amounting to $30,000.

XIII. Denies each and every other allegation contained in said petition.

XIV. Said bankrupt further alleges that he has fully, fairly, justly and truly accounted for all property and assets of any kind and nature belonging to him, to the receiver and trustee in bankruptcy herein, and that he has turned over to such receiver and trustee any and all property belonging to him as such bankrupt, and to which said receiver and trustee are entitled.

XV. Further answering, said bankrupt alleges that this Honorable

Court has no jurisdiction on a summary application of this kind, to compel the bankrupt to turn over to said trustee the alleged moneys herein sought to be recovered.

XVI. Further answering, said bankrupt alleges that the referee herein has no power or authority to try the issues raised by the petition and order to show cause herein, and the answer of the bankrupt, filed herewith, in that among other things the said referee has no power, on a summary application, to compel the bankrupt to pay over the alleged moneys sought to be recovered by the trustee herein, and upon the further ground that the compensation of the referee herein is dependent upon the result of this motion, and the point is hereby respectfully urged, without any intent of its being applicable personally to the referee herein, but upon the general proposition that the tribunal which is to try and determine the issue should be utterly disinterested in the result thereof.

31 That under the provisions of the Bankrupt Act, compensation of the referee herein is computed upon, among other things, moneys disbursed or credited by the trustee of the bankrupt estate, and if this motion is granted such amount of money will be materially increased, and thus increase the compensation of said referee.

Wherefore, the bankrupt prays that this motion may be denied.

HAYS & HERSHFIELD,
Attorneys for Bankrupt.

Office and Post Office Address, No. 141 Broadway, Borough of Manhattan, New York City.

COUNTY OF NEW YORK, *ss:*

Charles I. Lightstone, being duly sworn, deposes and says: That he is the bankrupt in this matter; that he has read the foregoing answer, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

CHARLES I. LIGHTSTONE.

Sworn to before me this 15th day of February, 1905.
[SEAL.]
ELI M. COHEN,
Notary Public, N. Y. Co.

(Endorsed:) Answer.—Filed Feb'y 17, '05.

32 United States District Court, Southern District of New York.

In the Matter of CHARLES I. LIGHTSTONE, Bankrupt. In Bankruptcy.

The trustee, Edward S. Thomas, having filed his petition herein and made a motion thereon on the 21st day of January, 1905, why the bankrupt should not turn over to petitioner as trustee the

sum of eighty-three thousand four hundred and twenty-seven and 93/100 dollars ($83,427.93), the same being assets alleged to have been concealed by the bankrupt from his trustee, and the bankrupt appearing and answering said petition, denying the allegations thereof, and thereafter the trustee and bankrupt appearing before me on said application, and I having heard the proofs offered by the respective parties, and the arguments of their counsel, and having duly considered the same, I find that the said bankrupt Charles I. Lightstone has concealed from his trustee and has in his possession money assets or property amounting to the sum of seventeen thousand five hundred dollars ($17,500), and it is therefore

Ordered, that the said Charles I. Lightstone turn over to the trustee herein, Edward S. Thomas, within twenty days from the service of this order upon him, the sum of seventeen thousand five hundred dollars.

Dated New York, August 2, 1905.

(A copy.)

PETER B. OLNEY, *Referee.*

33 In the District Court of the United States for the Southern District of New York.

In the Matter of CHARLES I. LIGHTSTONE, Bankrupt.

To Peter B. Olney, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows that he is the bankrupt above named.

That on the 2d day of August, 1905, an order, a copy of which is hereto annexed, was made and entered herein. That such order was and is erroneous, in that the said order finds, as a fact, that the said bankrupt has concealed from his trustee, and has in his possession, money, assets or property, amounting to the sum of $17,500, and it is ordered that he turn over to the trustee herein, Edward S. Thomas, within twenty days after the service of said order upon him, the sum of $17,500. Whereas, the evidence taken in this proceeding does not warrant such finding, and it appears from the said testimony that the said bankrupt has fully accounted for all the property which he had at the time of his adjudication as a bankrupt, and whereas, there is not sufficient evidence to warrant any such finding, and said finding is not sustained by the evidence, and it does not appear that the bankrupt has in his possession or

34 under his control the *the* said sum of $17,500 or any part thereof, or is able to comply with said order,

Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed, as provided in the Bankruptcy Law of 1898, in General Order 27.

Dated New York, August 25, 1905.

CHAS. J. LIGHTSTONE, *Petitioner.*

STATE OF NEW YORK,
County of ——, City of Saratoga, ss:

I, Charles I. Lightstone, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements and facts therein contained are true to the best of my knowledge, information and belief.

CHAS. I. LIGHTSTONE.

Sworn to before me this 25th day of August, 1905.
[SEAL.]
ELI M. COHEN,
Notary Public, N. Y. Co.

35 United States District Court, Southern District of New York.

In the Matter of CHARLES I. LIGHTSTONE, Bankrupt.

The Trustee, Edward S. Thomas, having filed his petition herein and made a motion thereon on the 21st day of January, 1905, why the bankrupt should not turn over to petitioner as trustee the sum of eighty-three thousand four hundred and twenty-seven & 93/100 dollars ($83,427.93), the same being assets alleged to have been concealed by the bankrupt from his trustee, and the bankrupt appearing and answering said petition, denying the allegations thereof, and thereafter the trustee and bankrupt appearing before me on said application, and I having heard the proofs offered by the respective parties, and the arguments of their counsel, and having duly considered the same, I find that the said bankrupt Charles I. Lightstone has concealed from his trustee and has in his possession money assets or property amounting to the sum of seventeen thousand five hundred dollars ($17,500), and it is therefore

Ordered, that the said Charles I. Lightstone turn over to the trustee herein, Edward S. Thomas, within twenty days from the service of this order upon him, the sum of seventeen thousand five hundred dollars.

Dated New York, August 2, 1905.
(A copy.)

PETER B. OLNEY, *Referee.*

36 District Court of the United States, Southern District of New York.

In the Matter of CHARLES I. LIGHTSTONE, Bankrupt.

Certificate of Referee.

I, Peter B. Olney, one of the referees in said court of bankruptcy, do hereby certify that in the course of the proceedings in said case before me, the following question arose pertinent to the said proceedings.

A petition in involuntary bankruptcy was filed against Charles I. Lightstone above named on the 25th day of August, 1904. He was thereafter duly adjudicated a bankrupt and such proceedings were thereafter had that Edward S. Thomas was duly elected and qualified trustee.

Thereafter such trustee filed his verified petition dated January 11, 1905, alleging and charging that the said bankrupt was concealing from him assets of the value of about $83,247.93, upon which petition an order was duly issued by me, directing the bankrupt to show cause why he should not pay over to his said trustee the said sum of $83,247.93 which it was alleged and charged was being concealed by said bankrupt. The said petition and order are hereto annexed. Thereafter the bankrupt filed an answer upon his oath to said petition, which answer is hereto annexed.

Thereafter considerable testimony was offered by the
37 trustee in support of the said petition and by the bankrupt in support of his answer and against the said petition, after which the motion was duly submitted to me upon the briefs of counsel, to the end that on the 2d day of August, 1905, I made an offer finding that the said bankrupt has concealed from his trustee and has in his possession money, assets or property amounting to the sum of $17,500, and ordering that the said bankrupt turn over to his trustee, said Edward S. Thomas, within twenty days from the service of said order upon him the said sum of $17,500; which said order is hereto annexed.

This is the order sought to be reviewed, and the question is whether upon all the evidence and the admissions of the answer I was justified in making the finding that the bankrupt has in his possession or under his control money, assets or property amounting to the sum of $17,500, which said bankrupt has concealed and is now concealing from his trustee.

The petition of the trustee upon which the motion was made, which is marked "A," hereto annexed, recites the papers, proceedings and the evidence on which the said motion was based, and certain of the papers and proceedings and evidence mentioned therein were duly offered in evidence by the trustee and duly received. In addition thereto other evidence was taken, all of which is herewith returned. The following is a summary of the evidence:

Lightstone, up to the time of the filing of the petition against him, to wit, on the 25th day of August, 1904, was conducting business as a jobber of woolens at No. 111 Greene street, New York City.

The answer makes the following admissions:

(1) That the bankrupt during the period of four months
38 before the bankruptcy purchased and received merchandise of the invoice value of $62,984, and during that same period borrowed and received sums of money from various banks and individuals amounting to about $26,800.

(2) That in August, 1904, he received on outstanding accounts the sum of $30,000.

(3) That in August, 1904, he received in the aggregate, includ-

ing the $30,000 on the outstanding accounts, about the sum of $54,209.

The bankrupt in his schedules puts his debts about $92,000. His assets he states as follows:

Merchandise, value unknown	
Fixtures, " "	
Debts due him about	$25,000.00
Money in banks, value unknown	
Insurance policies	13,000.00
An action for injuries sustained about	25,000.00

Contest over funds deposited in Chicago in a suit by Rosenberg against the bankrupt, amount unknown.

The proofs show that the cash in bank at the time of the bankruptcy to be	$794.89
The proofs indicate that the merchandise on hand were of the value of about	12,200.00
And the fixtures, about	100.00
His books show that during the months of May, June, July and August to the 25th he purchased merchandise, etc., of the invoice value of	63,944.79
And that during that same period his sales amounted to.	72,956.42

And of these sales $49,047.67 were made during the period August 1st to 25th.

The bankrupt admits that on January 2, 1904, he gave
39 the following signed statement to the mercantile agencies. This statement he says was true, for he investigated the matter himself:

Assets.

Merchandise	$44,463.76
Accounts receivable, good	23,941.12
Cash in bank	6,201.40
Cash on hand	227.21
Fixtures and machinery	600.00
	$75,433.49

Liabilities.

Liabilities for merchandise	$14,573.40	
Bank accommodation	19,500.00	
		34,073.*09*
		$41,360.09

There is no evidence of large losses in the business—and the books show that the expenses of the business, including the bankrupt's own drawings, amount to only $16,296.13 during the year 1904.

Of the $25,000 of debts owing the bankrupt, as per his schedule, the evidence indicates that about $18,000 are worthless.

The value of the assets at the time of the bankruptcy appears to have been about $20,000, and the amount of the debts $92,000. The above facts and circumstances point to concealment of assets and fraud practised by the bankrupt on his creditors.

The bankrupt admits as above noted the receipt by him during the month of August, 1904 (*i. e.*, from August 1st to August 25th) the sum of $54,209 in money. Of this cash he received on August 18th, $10,000; August 23d, $10,000, and August 24th, $5,000, as the proofs show.

These facts made it necessary for the bankrupt to account
40 at least for this large sum of $54,209 received during the period of twenty-five days just preceding the bankruptcy.

For the $10,000 received August 18th, the $10,000 received August 23d, and $5,000 received August 24th, making $25,000 in all received in the week preceding the bankruptcy, the bankrupt undertakes to account as follows:

He says (p. 54 test.) he lost the $10,000 received August 18th in gambling at Saratoga on the 19th, 20th and 21st of August; that in betting on the races, playing faro in the gambling houses and expenses at Saratoga he lost and expended in all $11,300; the only corroboration of his testimony on this point is the testimony of two witnesses who saw him playing faro for large stakes and did not see him taking in any winnings—testimony of little probative value on the claim that he lost this large sum in gambling; but I was not satisfied beyond a reasonable doubt that he did not lose this sum in the way claimed. Hence I credited him with that amount.

The $5,000 received August 24th, the day before the bankruptcy, he says he disposed of as follows (p. 106): He paid his counsel $2,250—this is not disputed, and I credited him with that sum. He says he paid his wife $1,200. I credited him with that payment, though the bankrupt's statement in that behalf is uncorroborated. The balance of the $5,000, to wit, $1,550, he paid out, he says, in incidental bills, including a doctor's bill for $500, and card debts of "probably $700" (pp. 62-68). His testimony as to these payments is unsatisfactory and uncorroborated, but I concluded to credit him with them.

Deducting the aggregate of these credits, viz., $16,300 from $54,209, the whole amount of cash he admits he received in August, there is left remaining a balance of $37,909 unaccounted for.
41 The bankrupt says, however, that he paid two notes, one on August 23d of $12,500, to a bookmaker named Klein (pp. 97 and 59), and the other on the 22d or 23d of August of $5,000 to one Abrams (p. 106).

The bankrupt testified as to the Klein note that in the spring of 1904 he entered into a partnership with Klein as race track bookmakers; he testifies that he did not know whether Klein's name was Charles Albert or Albert Charles Klein; that he did not know where Klein lived and never did; did not know where he was, thought he had gone to the Adirondacks and would be back soon.

That as the bankrupt did not have cash capital to put into the business he gave Klein his four months' note for $12,500. It does not appear that Klein negotiated and in that way turned the note into cash, for when the note became due Klein, according to the bankrupt's story, turned up at the bankrupt's office, on the maturity of the note, August 23d, with the note and demanded payment from the bankrupt, who paid him the amount thereof, not by check but in cash, that Klein surrendered the note to the bankrupt, who immediately tore it up. He took no receipt from Klein for the payment of the money. Nobody was present in the office when the note was signed and delivered to Klein; nobody present when Klein came into bankrupt's office to get his note paid; bankrupt had never seen Klein since he paid him the money; the bankrupt's bookkeeper never saw Klein in bankrupt's place and never heard of him up to the time of Lightstone's failure; there are no entries in Lightstone's books of the business — that Klein note. There was no corroboration whatsoever of bankrupt's story in regard to this Klein note (see pp. 53, 54, 57, 104*a*, 169, Exam. of bankrupt before Commissioner Gilchrist).

42 The bankrupt says he paid Abrams the 22d or 23d of August, $5,000 in cash (p. 106 testimony before Referee), and took up his note for $5,000, which had been running about three months, and was given for moneys that Abrams had obtained for him from time to time; did not give Abrams anything at all for negotiating the loan for him, which he brought to him in cash (p. 107). Abrams used to be in the pawnbroker business (p. 106); the loan was negotiated in bankrupt's office. If he wanted Abrams he would not know where to send for him; he meets him "upon Seventh avenue occasionally." No record of these Abrams loans upon his books, except only in his "private book" (p. 109). Abrams came to bankrupt's office when the note became due. The bankrupt says (p. 110), "When I gave him the $5,000 I think he gave me the note he had. Q. What did you do with it? A. Tore it up." The bankrupt paid Abrams in cash (p. 106); he says (p. 111) that he paid the money in the presence of one Roth, his brother-in-law; but Roth was not called to corroborate this statement.

The bankrupt is a man of intelligence, of considerable business experience, keeping several bank accounts and carrying on extensive mercantile business. A day or two before the bankruptcy he asks us to believe that under the circumstances set forth he paid out $17,500 and took up two of his notes aggregating that amount, both of which notes he immediately destroyed. The payments he makes in cash; he takes no receipt for the payments; he offers no evidence in support of his story other than his own testimony. His testimony I believe to be false. Hence I found he has failed to account for this $17,500, and directed him to pay over that sum to the trustee.

The remaining balance of the $54,209, viz., $20,409, I do not find the bankrupt has concealed, for the reason that there is evidence indicating that some moneys, considerable in amount, were

43 paid out by the bankrupt in the regular course of his busi-

ness during the month of August, and the said question is certified to the Judge for his opinion thereon.

Dated New York, October —, 1905.

——— ———,
Referee in Bankruptcy.

At a Stated Term of the District Court of the United States for the Southern District of New York, held in and for the County of New York, at the United States Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 1st day of December, 1905.

Present: Hon. George C. Holt, District Judge.

In the Matter of CHARLES I. LIGHTSTONE, Bankrupt.

A petition having been heretofore filed herein, dated the 25th day of August, 1905, for a review of the order of Referee Peter B. Olney, dated the 2d day of August, 1905, and the Referee having duly filed his certificate thereon, with a return of all the proceedings had before him appertaining thereto, and the said petition for review having duly come on for argument, and after reading
44 the said petition for review, the order sought to be reviewed, the certificate of the Referee, and all the proceedings attached thereto, and after hearing Daniel P. Hays, Esq., of counsel for the reviewing petitioner, in support of a motion to reverse the said order and Irving L. Ernst, Esq., of counsel for the Trustee, in opposition thereto,

Now, on motion of Black, Olcott, Gruber & Bonynge, attorneys for the Trustee, it is hereby

Ordered, that the said motion be and the same hereby is in all respects denied, and it is hereby further

Ordered, that the order of the Referee, dated the 2d day of August, 1905, hereby reviewed, be and the same hereby is in all respects affirmed.

[SEAL.] GEO. C. HOLT, *J.*

United States District Court, Southern District of New York.

EDWARD S. THOMAS, as Trustee in Bankruptcy of Charles I. Lightstone, Complainant,
against
SOL M. SUGARMAN and CHARLES I. LIGHTSTONE, Defendants.

Please take notice, that the plea in bar contained in the amended answer of the defendant Sol. M. Sugarman will be brought on for hearing and argument before this Court, in the Federal Court
45 House in the Post Office Building, at a Stated Term of this Court, held on the 14th day of May, 1906, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, and a motion will be made on the Bill of Complaint filed herein and the amended answer and plea filed herein, for the overruling of the said

plea in bar, and for such other and further relief as to the Court may seem proper.

Dated New York, May 7, 1906.

Yours, etc.,

JAMES, SCHELL & ELKUS,
Att'ys for Complainant Thomas.

Office and Post Office address, 50 Pine Street, Borough of Manhattan, City of New York.

To Max J. Kohler, Esq., Att'y for Defendant Sugarman, 42 Broadway, Borough of Manhattan, City of New York.

46 At a Stated Term of the United States District Court for the Southern District of New York, held in the United States Post Office and Court House Building, on the 7th day of June, 1906.

Present: Honorable George C. Holt, U. S. District Judge.

In Equity.

EDWARD S. THOMAS, as Trustee in Bankruptcy of Charles I. Lightstone, Complainant,
against
SOL M. SUGERMAN and CHARLES I. LIGHTSTONE, Defendants.

A Bill of Complaint having been duly filed herein by Edward S. Thomas, as Trustee in Bankruptcy of Charles I. Lightstone, on the 23d day of January, 1905, and a demurrer to said Bill of Complaint having been filed by said Sol. M. Sugerman, and said demurrer having been overruled by an Order made and entered October 12, 1905, with leave to said defendant Sugerman to answer and an answer having been filed by defendant Sugerman herein on or about November 2, 1905, and an order having been duly entered herein on consent, on or about April 10, 1906, amending said answer, by converting Paragraph 3 thereof into a plea in bar, and amplifying the same, as more fully appears by reference thereto, and the complainant having set said plea down for argument, and the Court having by consent of the parties considered on the
47 hearing of said plea certain papers on file herein, referred to in said pleas, to wit, the certificate of Referee in Bankruptcy, Peter B. Olney, on a petition to review a judgment and order made by him on or about August 2, 1905, against the aforementioned Charles I. Lightstone, including the petition of the Trustee in Bankrupty, attached to said certificate, together with the Order to Show Cause, issued thereon, as well as the answer of said Lightstone thereto, and the aforementioned order of said Referee, made on or about August 2, 1905, requiring said Lightstone to pay over the sum of $17,500, and an order of this Court, made on or about December 1, 1905, on said petition to review, affirming said order to pay over.

Now, after hearing Max J. Kohler, Solicitor for defendant Suger-

man, in support of said plea, and James, Schell and Elkus, Solicitors for complainant, in opposition thereto, due deliberation being had,

It is ordered, adjudged and decreed that said plea be and the same is hereby sustained.

And it is further ordered, that said defendant Sugerman have judgment thereon, dismissing said Bill of Complaint with costs in the sum of $25.30, as taxed.

GEO. C. HOLT,
United States District Judge.

48 United States District Court, Southern District of New York.
In Equity.

EDWARD S. THOMAS, as Trustee in Bankruptcy of Charles I. Lightstone, Complainant,
against
SOL M. SUGARMAN and CHARLES I. LIGHTSTONE, Defendants.

Sirs: Please take notice, that Edward S. Thomas, as Trustee, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from the order and judgment entered herein on the 7th day of June, 1906, in the Office of the Clerk of the District Court of the United States for the Southern District of New York, sustaining the plea in bar filed by the defendant Sol M. Sugarman to the Bill of Complaint herein, and awarding judgment to the defendant Sol M. Sugarman, and the said Edward S. Thomas, as Trustee, hereby appeals from each and every part of said order and judgment of the 7th of June, 1906.

Dated New York, June —, 1906.

Yours, etc.,
—— ——,
Attorneys for Appellants, 50 Pine Street, Borough of Manhattan, City of New York.

To Thomas Alexander, Esq., Clerk of the United States District Court for the Southern District of New York.
Max J. Kohler, Esq., Attorney for Sol M. Sugarman, 42 Broadway, New York City.

49 United States District Court, Southern District of New York.

EDWARD S. THOMAS, as Trustee in Bankruptcy of Charles I. Lightstone, Complainant,
against
SOL M. SUGARMAN and CHARLES I. LIGHTSTONE, Defendants.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The petition of Edward S. Thomas respectfully shows this Honorable Court:

I. That he is Trustee in Bankruptcy of Charles I. Lightstone, and that he has duly qualified by giving the bond required of him.

II. That on or about the 23d day of January, 1905, a Bill of Complaint in equity was filed in the Office of the Clerk of the United States District Court for the Southern District of New York, which said bill prayed for a decree setting aside the certain assignments and transfers of outstanding accounts and bills receivable, on the ground that said transfers were made for the purpose of hindering, delaying and defrauding the creditors of the said Charles I. Lightstone; and the Bill further prayed that the defendant Sol M. Sugarman be required to repay to the Trustee all moneys realized on the collection of the said accounts. The Bill of Complaint was demurred to by the defendant Sol M. Sugarman *on* the Bill was bad for multifariousness and that there was an illegal joinder of
50 causes of action. The said demurrer was overruled, and the defendant thereupon answered on the 2d day of November, 1905.

III. Thereafter, and on or about the 10th day of April, 1906, the said answer was amended by converting paragraph III thereof into a plea in bar. The said plea alleged that the Trustee in Bankruptcy by securing an order to compel the bankrupt to turn over certain funds alleged to be in his possession had ratified and confirmed the contract made by the bankrupt with Sol M. Sugarman, and that the Trustee was estopped from attacking the said contract.

IV. That on or about the 11th day of January, 1905, your petitioner, as Trustee, brought a proceeding to compel the bankrupt to turn over to your petitioner certain moneys which your petitioner alleged was being concealed by the bankrupt. A hearing was had on the said petition and testimony of various parties was taken, among them the testimony of Sol M. Sugarman, the defendant herein. The Referee found that the bankrupt was concealing the sum of $17,500 from your petitioner, and directed the turning over of this money. No money was turned over, and your petitioner has never received any funds from the bankrupt whatsoever in satisfaction of the requirements of the order of Peter B. Olney, Referee, directing the turning over of this fund. This order of the Honorable Peter B. Olney, Referee, was confirmed by the United States District Court on or about the 1st day of December, 1905.

V. Your petitioner as Trustee brought on the plea in bar urged by the defendant Sugarman for hearing and argument, and an order was made by the United States District Court, which order and judgment was duly entered in the Office of the Clerk of the United States District Court for the Southern District of New York on the
51 7th day of June, 1906, sustaining the said plea in bar and dismissing the Bill of Complaint with costs.

VI. Your petitioner further alleges, on information and belief, that by the said decision and judgment of the said District Court, error has been committed, and your petitioner feels aggrieved thereby, and is desirous of obtaining a review of the United States Circuit Court of Appeals for the Second Circuit of the said judgment upon errors assigned in the assignment of errors filed herein, and your petitioner has filed with the Clerk of this Court a bond with sufficient sureties in accordance with the rules of practice of this

Court, conditioned for the payment of damages and costs to the respondent in event that the said judgment should be affirmed by this Court.

Wherefore, your petitioner prays that an appeal may be allowed and citation herein be issued for the review of the said judgment by the United States Circuit Court of Appeals for the Southern District of New York for the Second Circuit, and a transcript of the proceedings and papers upon which said order and judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

And your petitioner will ever pray.

Dated New York, June 14, 1906.

EDWARD S. THOMAS,
Petitioner.
JAMES, SCHELL & ELKUS,
Attorneys for Petitioner.

Office and Post Office address, 50 Pine Street, Borough of Manhattan, City of New York.

Appeal allowed.
Dated New York, June —, 1906.

GEO. B. ADAMS,
U. S. D. J.

52 By the Honorable George W. Ray, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

The President of the United States of America, to Sol M. Sugarman, Greeting:

You are hereby cited and admonished to appear before a United States Circuit Court of Appeals for the Second Circuit, to be held at the Borough of Manhattan, in the City of New York, in the district and circuit above named, on the 16th day of July, 1906, pursuant to an appeal filed in the Office of the Clerk of the District Court for the Southern District of New York, and from the order and judgment sustaining the plea in bar of the defendant, Sol M. Sugarman, to the Bill of Complaint of Edward S. Thomas, as Trustee in Bankruptcy of Charles I. Lightstone, and from the order and judgment dismissing the said Bill of Complaint with costs, entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 7th day of June, 1906, in which appeal Edward S. Thomas, as Trustee in Bankruptcy of Charles I. Lightstone, is appellant, and you the appellee, to show cause, if any there be, why the said judgment in said appeal mentioned should not be reversed and corrected, and why speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the district and circuit above named, this 16th day

of June, in the year nineteen hundred and six, and of the Independence of the United States the one hundred and fourteenth.

GEO. B. ADAMS,
Judge of the District Court of the United States for the Northern District of New York, in the Second Circuit, Sitting and Presiding as Judge in the Southern District of New York.

53 United States District Court, Southern District of New York.

EDWARD S. THOMAS, as Trustee in Bankruptcy of Charles I. Lightstone, Complainant,
against
SOL M. SUGARMAN and CHARLES I. LIGHTSTONE, Defendants.

And now at a Term of the above named Court for the year 1906, comes Edward S. Thomas, Trustee, appellant and complainant in error, by James, Schell & Elkus, his attorneys, and says that in the record of proceedings in the above entitled Court there is manifest error, and he makes and files the following assignment of errors:

I.

That the United States District Court for the Southern District of New York erred in sustaining the plea in bar to the Bill of Complaint filed by the complainant herein, and said Court erred in granting judgment for the defendant Sol M. Sugarman.

II.

That the United States District Court for the Southern District of New York erred in finding that the Trustee in Bankruptcy had ratified and approved the fraudulent dealings entered into between the defendant Sol M. Sugarman and Charles I. Lightstone, and that the said Trustee was estopped from taking any proceedings
54 to set aside the transaction entered into between Sol M. Sugarman and Charles I. Lightstone.

III.

The United States District Court for the Southern District of New York erred in finding that the order made by the Honorable Peter B. Olney, on the 2d day of August, 1905, directing Charles I. Lightstone, the bankrupt herein, to turn over to his Trustee the sum of $17,500, was a bar to the action instituted by the complainant herein.

IV.

That the United States District Court for the Southern District of New York erred in finding that the unsatisfied judgment against Charles I. Lightstone was a bar to an action against Sol M. Sugarman.

V.

The United States District Court for the Southern District of New York erred in granting the order of June 7, 1906, sustaining the plea in bar and dismissing the Bill of Complaint with costs.

Wherefore, Edward S. Thomas, as Trustee, prays that the judgment of the District Court of the United States for the Southern District of New York, made on the 7th day of June, 1906, be reversed, and that the plea in bar filed by the defendant Sol M. Sugarman be overruled, and that your petitioner have such other and further relief in the premises as to this Court may seem just and proper.

EDWARD S. THOMAS.

Dated New York, June 14, 1906.

55 United States District Court, Southern District of New York.

EDWARD S. THOMAS, as Trustee in Bankruptcy of Charles I. Lightstone, Complainant,

against

SOL M. SUGARMAN and CHARLES I. LIGHTSTONE, Defendants.

It is hereby stipulated between the attorneys for the respective parties that the Record on Appeal shall consist of the following papers, and that the printing of all other papers now on file in the United States District Court shall be waived.

Citation.

Notice of Appeal.

Petition of Appeal and Allowance.

Assignment of Errors.

Bill of Complaint of Edward S. Thomas, as Trustee in Bankruptcy against Sol M. Sugarman and Charles I. Lightstone, filed on the 23d day of January, 1905.

Demurrer of Sol M. Sugarman to Bill of Complaint.

Order of Honorable George C. Holt overruling Demurrer.

Answer of the defendant Sol M. Sugarman filed November 2, 1905.

Order amending Answer, filed April 10, 1906.

Order of the Honorable Peter B. Olney, dated January 11, 1905, directing Charles I. Lightstone to show cause why he should not turn over certain moneys.

56 Petition of Edward S. Thomas, as Trustee, annexed to the said Order to show cause.

Answer of the said Charles I. Lightstone to the said Order to show cause.

Order of the Honorable Peter B. Olney made on the 2d day of August, 1905, directing Charles I. Lightstone to turn over certain moneys.

Certificate of the Honorable Peter B. Olney on a Petition to Review the Order of August 2, 1905.

Order of the Honorable George C. Holt, dated the 1st day of

December, 1905, sustaining the order of the Honorable Peter B. Olney directing the bankrupt to pay over $17,500.

Notice of Motion bringing on plea in bar contained in Amended Answer for argument, dated May 7, 1906.

Order of the Honorable George C. Holt sustaining the Plea in Bar together with costs entered the 7th day of June, 1906.

It is further stipulated, and this stipulation shall be printed as a part of the Appeal Record, that it was admitted by all the parties on the argument of the plea that the Trustee had received no money from Charles I. Lightstone in settlement and payment of the order to turn over granted by Peter B. Olney, Esq., and affirmed in the District Court.

JAMES, SCHELL & ELKUS,
Solicitors for Complainant, Edward S. Thomas.
MAX J. KOHLER,
Solicitor for Defendant, Sol M. Sugarman.

57 UNITED STATES OF AMERICA,
Southern District of New York, ss:

EDWARD S. THOMAS, as Trustee in Bankruptcy of Charles I. Lightstone, Complainant-Appellant,
vs.
SOL M. SUGARMAN and CHARLES I. LIGHTSTONE, Defendants-Appellees.

I, Thomas Alexander, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of so much of the record of the District Court in the above-entitled matter as is by stipulation annexed hereto attached.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 8th day of October, in the year of our Lord one thousand nine hundred and six, and of the Independence of the said United States the one hundred and thirty-first.

[SEAL.] THOS. ALEXANDER, *Clerk.*

58 At a stated term of the United States Circuit Court of Appeals for the Second Circuit held at the Court Rooms in the Post Office Building, City of New York, on the 20th day of June 1907.

EDWARD S. THOMAS, as Trustee, etc., Complainants-Appellants,
vs.
SOL M. SUGARMAN ET AL., Defendants-Appellees.

Before Judges Lacombe and Coxe.

Ordered that this case be placed upon the October Term 1907 calendar for reargument before a full bench.

E. H. LACOMBE, *U. S. C. J.*

Endorsed: United States Circuit Court of Appeals Second Circuit E. E. Thomas *vs.* S. M. Sugerman. Order. United States Circuit Court of Appeals Second Circuit Filed Jun- 20, 1907. William Parkin, Clerk.

59 United States Circuit Court of Appeals for the Second Circuit.

No. 8, October Term, 1907.

Argued October 9, 1907; Decided November 7, 1907.

EDWARD S. THOMAS, as Trustee, etc., Complainant–Appellant,
vs.
SOL M. SUGERMAN and CHARLES I. LIGHTSTONE, Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

Before Judges Lacombe, Coxe and Ward.

WARD, *Circuit Judge:*

The complainant, trustee in bankruptcy of the defendant Lightstone, filed this bill in equity alleging that Lightstone, when insolvent and within the four months preceding the filing of the petition in bankrutpcy, sold outstanding accounts aggregating $47,197.61 to the defendant Sugerman and received therefor the sum of $30,000, both parties intending thereby to defeat and defraud Lightstone's creditors. The bill prayed that the transfer might be set aside as fraudulent.

The defendant Sugerman filed a plea in bar to the effect that the plaintiff with a full knowledge of all the facts had ratified the transfer by obtaining an order from the District Judge requiring the bankrupt to turn over to him the sum of $17,500, balance of the payment of $30,000 received and not accounted for.

60 The complainant set the plea down for argument. The court, by consent of parties, considered in connection with the plea the complainant's petition as trustee, the answer of the bankrupt and the certificate of the referee which showed that the sum of $17,500 found to have been concealed by the bankrupt was arrived at after charging him with the whole $30,000 received from Sugerman. The District Judge sustained the plea.

It is quite clear that if Lightstone had been induced to make the transfer to Sugerman by fraud, he could not at the same time retain the $30,000 and ask to have the transfer set aside. Such claims would be inconsistent because the retaining of the payment would be an affirmance of the contract of sale, while the claim to have the transfer set aside would be a repudiation of it. *Cobb v. Hatfield,* (46 *N. Y.* 533, 537).

It is also quite clear that if both the parties to the transfer had made it with the intention to defraud third parties, the law would

give relief to neither as against the other. The complainant, as trustee, however, represents not only the bankrupt, alleged to be a party to the fraud, but his creditors who are innocent, and he may assert on their account rights against Sugerman which the bankrupt could not.

If the complainant was entitled to set the transfer aside as fraudulent he could have recovered the accounts from Sugerman, but would have had to return to him the price or any part of it paid to the bankrupt which the complainant had received. This is because the right of the creditors was simply to be made whole. For the same reason he would not have had to credit Sugerman with anything paid by Sugerman to the bankrupt which he, the complainant, had not actually received from the bankrupt.

Of course, if the trustee had found the $30,000 in the bankrupt's deposit box and taken it into his possession, or if the bankrupt had voluntarily paid the sum to him, the mere receipt of the money would not amount to an election by the trustee to affirm the transfer. But that is not the case. The trustee here, with a full knowledge of all the facts alleged in a formal proceeding that the bankrupt had in his possession and was concealing money and by that proceeding he has, so to speak, created a fund.

61 Nor can we adopt the appellant's theory that in this proceeding the trustee was merely seeking to get in the bankrupt's estate in order to determine after it was in his hands whether to affirm or to repudiate the transfer to Sugerman. The papers and proceedings show nothing of the kind, but, on the contrary, that he was seeking to get the money as a part of the bankrupt's estate to be distributed among the creditors.

The case presents an election between inconsistent rights. It makes no difference that the defendant Sugerman was not a party to the proceeding in which the complainant charged the bankrupt with the money paid for the accounts transferred by him, or that the complainant actually recovered nothing in that proceeding. This act confirmed the title to those accounts in Sugerman.

In an action against the defendant for conversion of personal property, it appeared that the plaintiffs had begun a previous action against two persons who had removed that property to recover the value of plaintiffs' interest therein. The court held the action not maintainable because the plaintiffs had elected by proceeding in the first action on the theory of a sale, to rely upon an inconsistent right. Judge Peckham said:

"The plaintiffs having by their former action, in effect, sold this very property, it must follow that at the time of the commencement of this one they had no cause of action for conversion in existence against the defendant herein. The transfer of the title did not depend upon the plaintiffs recovering satisfaction in such action for the purchase price. It was their election to treat the transaction as a sale which accomplished that result, and that election was proved by the complaint already referred to.

But it is urged that this election of the plaintiffs is not binding upon them in favor of the defendant herein, because it was only

against the defendants in the other action that they made their election. It is said there is no case to be found where an election has been treated as binding in favor of a stranger to the transaction,
62 and that the defendant herein is such stranger so far as the plaintiffs' transaction with the defendants in the other action is concerned.

I do not think this claim can be maintained. In the first place, what is the nature of the plaintiffs' act in electing to consider the transaction as a sale? It is a decision or determination upon their part to in effect ratify and proclaim the lawfulness of the act of taking the property, and it is an assertion on the plaintiffs' part that in so doing the plaintiffs' interest in the property was purchased, and that thereby their whole title was transferred and they ceased to own any part of the property, and that those who took it impliedly promised the plaintiffs to pay them the value of their interest in such property. This being so, why does not such transfer of title bind the plaintiffs as to the whole world? Surely, the title which plaintiffs once had in the property cannot at the same time rest with them and pass to those who took it. If the title really once passed, that would be a fact actually existing, which anybody ought to have the right to prove if it became material in protecting his own rights, unless there were some equitable considerations in such case which should prevent it. I cannot see that any exist here. With full knowledge of all the facts, the plaintiffs deliberately elected to treat the transaction, in which this defendant's share was well known, as a sale of the property, and now they propose to recover from this defendant damages for the conversion by him of the very same property which they have already said they sold by virtue of the very transaction which they now claim amounted to a conversion of the property by this defendant. Why should the defendant not be permitted to set up such sale as a complete defense to this action? The plaintiffs have done nothing by reason of defendant's acts which should estop him from setting up this defense. Their situation has not since been altered for the worse by anything the defendant has done. If not, then the fact that the plaintiffs sold the property by virtue of the transaction which they now seek to treat as a conversion of it by this defendant, must and ought to operate as a perfect bar to the maintenance of this action. And this
63 is not in the least upon the principle of equitable estoppel. It is upon the principle that the plaintiffs, by their own free choice, decided to sell the property, and, having done so, it necessarily follows that they have no cause of action against defendant for an alleged conversion of the same property by the same acts which they had already treated as amounting to a sale."

Terry v. Munger (121 *N. Y.* 161, 168).
Deitz v. Field, (10 *App. Div.* 429).
Butler v. Hildreth, (5 *Met.* 49).

The judgment of the court below is affirmed.

A. I. Elkus, for the Appellant.
J. J. Crawford, for the Appellees.

64 United States Circuit Court of Appeals for the Second Circuit.

No. 8, October Term, 1907.

Argued October 9, 1907; Decided November 7, 1907.

EDWARD S. THOMAS, as Trustee, etc., Complainant-Appellant,
vs.
SOL M. SUGERMAN and CHARLES I. LIGHTSTONE, Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

Before Judges Lacombe, Coxe, and Ward.

LACOMBE, *Circuit Judge:*

I am unable to concur with the majority of the Court. It seems to me that a trustee in bankruptcy does not perform any act of election, of which some debtor of the bankrupt can take advantage, merely because he fulfills his statutory duty to possess himself of all the property in bankrupt's possession at the time of the bankruptcy, as promptly as he can. It is conceded that if the bankrupt had kept the $30,000 in a private safe in some deposit company and upon learning of the appointment of the trustee had delivered it to the latter, receipt of it would not constitute an election, and I cannot see how the situation is changed by the circumstance that the bankrupt delivers it in obedience to an order to show cause, or turns over only part of it because he has squandered the remainder. It would seem to be a disastrous rule to apply that, whenever a trustee insists that a bankrupt shall turn over all the property in his possession, he thereby ratifies by election all sorts of transactions which the bankrupt may have had with the persons from whom he got the property, and I am not satisfied that the authorities cited require such an extension of the doctrine of election.

65 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 18th day of November, one thousand nine hundred and seven.

Present: Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Henry G. Ward, Circuit Judges.

EDWARD S. THOMAS, as Trustee, etc., Complainant-Appellant,
vs.
SOL M. SUGARMAN and CHARLES I. LIGHTSTONE, Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

against the defendants in the other action that they made their election. It is said there is no case to be found where an election has been
treated as binding in favor of a stranger to the transaction,
62 and that the defendant herein is such stranger so far as the
plaintiffs' transaction with the defendants in the other action is concerned.

I do not think this claim can be maintained. In the first place, what is the nature of the plaintiffs' act in electing to consider the transaction as a sale? It is a decision or determination upon their part to in effect ratify and proclaim the lawfulness of the act of taking the property, and it is an assertion on the plaintiffs' part that in so doing the plaintiffs' interest in the property was purchased, and that thereby their whole title was transferred and they ceased to own any part of the property, and that those who took it impliedly promised the plaintiffs to pay them the value of their interest in such property. This being so, why does not such transfer of title bind the plaintiffs as to the whole world? Surely, the title which plaintiffs once had in the property cannot at the same time rest with them and pass to those who took it. If the title really once passed, that would be a fact actually existing, which anybody ought to have the right to prove if it became material in protecting his own rights, unless there were some equitable considerations in such case which should prevent it. I cannot see that any exist here. With full knowledge of all the facts, the plaintiffs deliberately elected to treat the transaction, in which this defendant's share was well known, as a sale of the property, and now they propose to recover from this defendant damages for the conversion by him of the very same property which they have already said they sold by virtue of the very transaction which they now claim amounted to a conversion of the property by this defendant. Why should the defendant not be permitted to set up such sale as a complete defense to this action? The plaintiffs have done nothing by reason of defendant's acts which should estop him from setting up this defense. Their situation has not since been altered for the worse by anything the defendant has done. If not, then the fact that the plaintiffs sold the property by virtue of the transaction which they now seek to treat as a conversion of it by this defendant, must and ought to operate
as a perfect bar to the maintenance of this action. And this
63 is not in the least upon the principle of equitable estoppel.
It is upon the principle that the plaintiffs, by their own free choice, decided to sell the property, and, having done so, it necessarily follows that they have no cause of action against defendant for an alleged conversion of the same property by the same acts which they had already treated as amounting to a sale."

Terry v. Munger (121 *N. Y.* 161, 168).
Deitz v. Field, (10 *App. Div.* 429).
Butler v. Hildreth, (5 *Met.* 49).

The judgment of the court below is affirmed.

A. I. Elkus, for the Appellant.
J. J. Crawford, for the Appellees.

64 United States Circuit Court of Appeals for the Second Circuit.

No. 8, October Term, 1907.

Argued October 9, 1907; Decided November 7, 1907.

EDWARD S. THOMAS, as Trustee, etc., Complainant-Appellant,
vs.
SOL M. SUGERMAN and CHARLES I. LIGHTSTONE, Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

Before Judges Lacombe, Coxe, and Ward.

LACOMBE, *Circuit Judge:*

I am unable to concur with the majority of the Court. It seems to me that a trustee in bankruptcy does not perform any act of election, of which some debtor of the bankrupt can take advantage, merely because he fulfills his statutory duty to possess himself of all the property in bankrupt's possession at the time of the bankruptcy, as promptly as he can. It is conceded that if the bankrupt had kept the $30,000 in a private safe in some deposit company and upon learning of the appointment of the trustee had delivered it to the latter, receipt of it would not constitute an election, and I cannot see how the situation is changed by the circumstance that the bankrupt delivers it in obedience to an order to show cause, or turns over only part of it because he has squandered the remainder. It would seem to be a disastrous rule to apply that, whenever a trustee insists that a bankrupt shall turn over all the property in his possession, he thereby ratifies by election all sorts of transactions which the bankrupt may have had with the persons from whom he got the property, and I am not satisfied that the authorities cited require such an extension of the doctrine of election.

65 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 18th day of November, one thousand nine hundred and seven.

Present: Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Henry G. Ward, Circuit Judges.

EDWARD S. THOMAS, as Trustee, etc., Complainant-Appellant,
vs.
SOL M. SUGARMAN and CHARLES I. LIGHTSTONE, Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

E. H. L.
H. G. W.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

66 Endorsed: United States Circuit Court of Appeals, Second Circuit. E. S. Thomas *vs.* S. S. Sugerman. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 18, 1907. William Parkin, Clerk.

67 United States Circuit Court of Appeals for the Second Circuit.

EDWARD S. THOMAS, as Trustee in Bankruptcy of CHARLES I. LIGHTSTONE, Complainant-Appellant,
against
SOL. M. SUGARMAN and CHARLES I. LIGHTSTONE, Defendants-Appellees.

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

The Petition of Edward S. Thomas respectfully shows:

I. That he is Trustee in Bankruptcy of Charles I. Lightstone, and that he has duly qualified by the giving of the bond required of him.

II. That on or about the 23rd day of January, 1905, a bill of complaint in equity was filed in the office of the Clerk of the United States District Court for the Southern District of New York, which said bill prayed for a decree setting aside certain assignments and transfers on the ground that the said transfers were made for the purpose of hindering, delaying and defrauding the creditors of the said Charles I. Lightstone, and the said bill further prayed that the defendant Sol. M. Sugarman be required to report to the Trustee all moneys realized from the said transfers.

III. That thereafter and on or about the 10th day of
68 April, 1906, the defendant Sol. M. Sugarman set up a plea in bar to the said bill of complaint. The said plea alleged that the trustee in bankruptcy, by securing an order to compel the bankrupt to turn over certain funds alleged to be in his possession, had ratified and adopted the alleged fraudulent transfer made by the bankrupt to Sol. M. Sugarman, and the trustee in bankruptcy, by virtue of this action, was estopped from taking any proceedings to set aside the said transfer.

IV. The proceedings alleged by the defendant to be of such a nature as to bar the trustee's action were as follows: On or about the 11th day of January, 1905, the trustee brought a proceeding to compel the bankrupt to turn over to the said trustee certain moneys which were alleged to be concealed by the bankrupt and which were alleged to be in his possession. A hearing was had on the said

petition, and testimony of various parties was taken, among them the testimony of Sol. M. Sugarman, the defendant appellee herein. Sol. M. Sugarman testified to having delivered to the bankrupt the sum of $30,000.00, in consideration of the alleged fraudulent transfer. The Referee in Bankruptcy charged the bankrupt with having received this sum of $30,000.00, together with further sums which aggregated $54,209.00, and after crediting the bankrupt with disbursements made by him, it was found that the bankrupt was still concealing the sum of $17,500.00 from his trustee in bankruptcy, and the Court directed the bankrupt to deliver this
69 sum to the trustee. No money was ever paid to the trustee in Bankruptcy, and the order at the present time remains wholly unsatisfied, and has never been complied with.

V. The United States District Court sustained the plea in bar and entered an order to that effect, dismissing the bill of complaint, with costs, on the 7th day of June, 1906.

VI. An appeal was taken from this order to the United States Circuit Court of Appeals for the Second Circuit, and the order as made by the District Court was affirmed by a divided Court, and a mandate was entered in accordance with the affirmance on the 27th day of November, 1907.

VII. Your petitioner alleges that the mandate of the United States Circuit Court of Appeals for the Second Circuit, affirming the order of the District Court, is erroneous, and your petitioner feels aggrieved thereby, and is desirous of obtaining a review by the Supreme Court of the United States for the Second Circuit of the said mandate, upon errors assigned in the assignment of errors filed herein.

VIII. Now comes Abram I. Elkus, solicitor of the said appellant, and petitions this Court for an order allowing your petitioner to prosecute an appeal from the said final order of the United States Circuit Court of Appeals to the Supreme Court of the United States under and in accordance with the laws of the United States
70 in such behalf made. Your petitioner is advised by counsel that there are grave doubts that the judgment and mandate of the United States Circuit Court of Appeals is a valid judgment, and your petitioner is advised that grave errors of law have been committed by the said Court.

Wherefore your petitioner prays that an appeal may be allowed and a citation be issued for the review of the said judgment and mandate of the United States Circuit Court of Appeals for the Second Circuit by the Supreme Court of the United States and that a transcript of the proceedings and papers upon which said mandate and judgment were made, duly authenticated, may be sent to the Supreme Court of the United States at Washington for its determination as to the questions involved in the said appeal.

And your petitioner will ever pray.

Dated, New York, February 5, 1908.

EDWARD S. THOMAS, *Petitioner.*

ABRAM I. ELKUS,
Solicitor for Petitioner,
170 *Broadway, Borough of Manhattan, City of New York.*

The foregoing petition for appeal is allowed this 17th day of March, 1908.

H. G. WARD,
Judge of U. S. C. C. A., for 2nd Cir.

70½ CITY AND COUNTY OF NEW YORK, *ss:*

Edward S. Thomas, being duly sworn says that he is petitioner *the* in this action; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

EDWARD S. THOMAS.

Sworn to before me this 5th day of February, 1908.

[SEAL.] M. J. SHOOLBRED,
Notary Public, Kings Co., No. 130.

Certificate filed in New York County.

71 Endorsed: United States Circuit Court of Appeals for the Second Circuit. Edward S. Thomas, as Trustee, etc., Complainant-Appellant, against Sol. M. Sugarman, and Charles I. Lightstone, Defendants-Appellees. Petition for Appeal. James, Schell & Elkus, Attorneys for Appellant, 170 Broadway, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 17, 1908. William Parkin, Clerk.

Please take notice that the within is a copy of — this day duly entered and filed in the within entitled action in the office of the Clerk of the — in the Borough of Manhattan, in the City of New York.

Dated, New York, —— —, 1—.

Yours, &c., JAMES, SCHELL & ELKUS,
Attorneys for —— ——,
170 *Broadway, Borough of Manhattan, New York City.*

To ——,
Attorney for —— ——.

72 United States Supreme Court.

EDWARD S. THOMAS, as Trustee in Bankruptcy of CHARLES I. LIGHTSTONE, Complainant-Appellant,
against
SOL. M. SUGERMAN and CHARLES I. LIGHTSTONE, Defendants-Appellees.

Now comes Edward S. Thomas, as trustee of Charles I. Lightstone, Appellant and Complainant in Error, by Abram I. Elkus, his solicitor, in connection with his petition for appeal to the Supreme Court

of the United States from a mandate of the Circuit Court of Appeals of the United States for the Second Circuit, entered on the 27th day of November, 1907, and says that in the record of the proceedings in the United States Circuit Court of Appeals there is manifest error, and he makes and files the following assignments of error:

I. That the United States Circuit Court of Appeals for the Second Circuit erred in affirming the final order of the District Court sustaining the plea in bar to the bill of complaint filed by the complainant herein, and the said Court erred in affirming the judgment dismissing the bill of Complaint of the trustee in bankruptcy with costs.

II. That the said United States Circuit Court of Appeals
73 erred as a matter of law in finding upon the facts submitted that the trustee in bankruptcy had ratified and approved the fraudulent dealings entered into between the defendant Sol. M. Sugarman, and Charles I. Lightstone, and that the said trustee was estopped from taking proceedings to set aside the fraudulent transfer made by Charles I. Lightstone.

III. That the United States Circuit Court of Appeals erred, as a matter of law, in finding that the order of the Referee in Bankruptcy, directing Charles I. Lightstone to turn over to his trustee the sum of $17,500.00, when unsatisfied, was a bar to the action instituted by the complainant herein.

IV. That the United States Circuit — of Appeals erred, as a matter of law, when it found that the trustee in Bankruptcy, in instituting proceedings to compel the bankrupt to turn over property in his possession, thereby performed an act of election which barred the trustee from taking steps to set aside, by a bill in equity, a fraudulent transfer.

V. That the United States Circuit Court of Appeals erred, as a matter of law, in finding that the trustee made an election, as between two inconsistent rights, in view of the fact that the said rights were not inconsistent and that the defendant Sol. M. Sugarman was not a party to the proceedings to compel the bankrupt to surrender*ed* concealed moneys, and in view of the fact that the trustee in bankruptcy recovered nothing from the turn-over proceedings.

74 VI. That the United States Circuit Court of Appeals erred, as a matter of law, in finding that the trustee, in instituting proceedings to compel the bankrupt to surrender concealed moneys elected to treat a fraudulent transfer as a sale which was unimpeachable.

By reason whereof your petitioner prays that the said mandate of the United States Circuit Court of Appeals for the Second Circuit be reversed and that the plea in bar filed by the defendant Sol. M. Sugarman be overruled and the proceedings be remanded to the United States District Court for the Southern District of New York with a direction that the said Sol. M. Sugarman file an answer upon the merits to the said bill of complaint, and that your petitioner

have such other and further relief as to this Court may seem just and proper.

Dated New York, February 5, 1908.

EDWARD S. THOMAS,
Complainant-Appellant.

ABRAM I. ELKUS,
Solicitor for Appellant, 170 *Broadway,*
Borough of Manhattan, City of New York.

74½ CITY AND COUNTY OF NEW YORK, *ss:*

Edward S. Thomas, being duly sworn, says that he is appellant *the* in this action; that he has read the foregoing assignment of errors and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

EDWARD S. THOMAS.

Sworn to before me this 5th day of February, 1908.
[SEAL.] M. J. SHOOLBRED,
Notary Public, Kings Co., No. 130.

Certificate filed in New York County.

75 (Endorsed:) United States Supreme Court. Edward S. Thomas, as Trustee, etc., Complainant-Appellant, against Sol. M. Sugarman and Charles I. Lightstone, Defendants-Appellees. Assignment of Errors. James, Schell & Elkus, Attorneys for Appellant, 170 Broadway, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 17, 1908. William Parkin, Clerk.

Please take notice that the within is a copy of — this day duly entered and filed in the within entitled action in the office of the Clerk of the — in the Borough of Manhattan, in the City of New York.

Dated, New York, —— —, 1—.

Yours, &c., JAMES, SCHELL & ELKUS,
Attorneys for —— ——,
170 *Broadway, Borough of Manhattan, New York City.*

To —— ——,
Attorney for —— ——.

76 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from — to — inclusive, contain a true and complete transcript of the record and proceedings had in said Court,

in the case of Edward S. Thomas, as Trustee, etc., against Sol M. Sugarman and Charles I. Lightstone, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 23d day of March in the year of our Lord One Thousand Nine Hundred and Eight and of the Independence of the said United States the One Hundred and thirty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

77 By the Honorable Henry G. Ward, Circuit Judge, one of the Judges of the United States Circuit Court of Appeals for the Second Circuit:

The President of the United States of America to Solomon M. Sugarman, Greeting:

You are hereby cited and admonished to appear before the Supreme Court of the United States, to be held in Washington, District of Columbia, on the 16th day of April, one thousand nine hundred and eight, pursuant to an appeal for the judgment and mandate of the United States Circuit Court of Appeals affirming the judgment of the United States District Court for the Southern District of New York, sustaining the plea in bar of the defendant Sol. M. Sugarman to the bill of complaint of Edward S. Thomas, as Trustee in Bankruptcy of Charles I. Lightstone, in which appeal Edward S. Thomas, as Trustee in Bankruptcy of Charles I. Lightstone, is the appellant and you the appellee, to show cause, if any there be, why the said judgment and mandate of the United States Circuit Court of Appeals should not be reversed and corrected and why speedy justice should not be done in that behalf.

Given under my hand, in the City of New York, in the Southern District of New York, this 17th day of March in the Year one thousand nine hundred and eight, and of the independence of the United States the one hundred and *eighteenth.*

H. G. WARD,
One of the Judges of the Circuit Court of Appeals of the United States for the Second Circuit.

77½ CITY AND COUNTY OF NEW YORK, *ss:*

—— ——, being duly sworn says that he is — the — in this action; that he has read the foregoing — and knows the contents thereof; that the same is true of — own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

—— ——.

Sworn to before me this — day of ——, 1—.

—— ——.

78 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Edward S. Thomas, as Trustee in Bankruptcy of Charles I. Lightstone, Complainant-Apl't, against Sol. M. Sugarman and Charles I. Lightstone, Defendants-Appellees. (Original.) Citation. James, Schell & Elkus, Attorneys for Petitioner, 170 Broadway, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 21, 1908. William Parkin, Clerk.

Please take notice that the within is a copy of — this day duly entered and filed in the within entitled action in the office of the Clerk of the — in the Borough of Manhattan, in the City of New York.

Dated, New York, —— —, 1—.

Yours, &c., JAMES, SCHELL & ELKUS,

Attorneys for —— ——,

170 *Broadway, Borough of Manhattan, New York City.*

Due service of a copy of the within is hereby admitted.

Dated, New York, March 20, 1908.

JOHN J. CRAWFORD,

Solicitor for D'f't.

Endorsed on cover: File No. 21,114. U. S. circuit court appeals, 2d circuit. Term No. 711. Edward S. Thomas, as trustee in bankruptcy of Charles I. Lightstone, bankrupt, appellant, *vs.* Solomon M. Sugarman. Filed April 15th, 1908. File No. 21,114.

Supreme Court of the United States.

EDWARD S. THOMAS, as Trustee in Bankruptcy of Charles I. Lightstone, Bankrupt,
Appellant,
against
SOLOMON M. SUGARMAN.

October Term, 1909.
No. 131.

Brief for Appellant.

Appeal from a decree of the United States Circuit Court of Appeals for the Southern District of New York, affirming a decree of the United States District Court for the Southern District of New York, which sustained the plea in bar of the defendant, Sugarman, to the bill of complaint filed by the appellant.

The action was brought by the appellant as trustee in bankruptcy to set aside as fraudulent a transfer made to the defendant, Sugarman. The plea in bar set up an order secured by the trustee requiring the bankrupt to turn over concealed assets, which included proceeds of the sale attacked (*fols. 1–7, 18–19, 77*).

Statement of Facts.

On August 25th, 1904, an involuntary petition in bankruptcy was filed against the defendant,

Lightstone, in the United States District Court, Southern District of New York. Subsequently, Lightstone was duly adjudicated a bankrupt and the complainant was elected and duly qualified as his trustee in bankruptcy (*fol. 21*).

On January 23rd, 1905, complainant as trustee in bankruptcy filed a bill of complaint against the defendant, Sugarman, joining the bankrupt as a party defendant, in which it is alleged:

That on August 9, 1904, the bankrupt and Sugarman entered into a written agreement, pursuant to which the bankrupt transferred to Sugarman outstanding accounts amounting to $47,197.61 in consideration of the payment of $30,000 during the two weeks prior to the filing of the petition (*fols. 2–3*);

That these transfers were made within four months preceding the filing of the petition and while the bankrupt knew himself to be insolvent and were made with the intent on the part of the bankrupt to hinder, delay and defraud his creditors and pursuant to a fraudulent scheme so to do;

That Sugarman was not a purchaser in good faith (*fols. 3–4*);

That the transfer was part of a fraudulent scheme and conspiracy entered into between the bankrupt and Sugarman with the intent on the part of both to hinder, delay and defraud the creditors of the bankrupt, and that Sugarman had full knowledge of the fraudulent intent and of the insolvent condition of the bankrupt (*fol. 5*);

The relief demanded was that the transfer of accounts be set aside as made to hinder, delay and defraud the creditors of the bankrupt; that the defendant be compelled to reassign such of the accounts as had not been paid and be required to pay to the complainant all sums realized on the collection of such of the accounts as had been paid (*fol. 6*).

Sugarman demurred to the complaint (*fols. 10–11*). The demurrer was overruled by the District Court (*fols. 12–13*). He then filed an answer in which he admitted the purchase of the accounts and set forth as a separate defense that the complainant was estopped from attacking the transfer because he had secured an order requiring the bankrupt to pay over concealed assets, consisting in part of a portion of the moneys paid to the bankrupt for the accounts (*fols. 14–17*).

Sugarman then moved to convert the separate defense into a plea in bar and this motion was granted.

The plea in bar asserts that the complainant with knowledge of all the facts has ratified the defendant's contract with Lightstone and is estopped from attacking it because he secured an order against the bankrupt from the referee in bankruptcy on August 2nd, 1905, for the payment by the bankrupt of $17,500 remaining in the bankrupt's hands of the $30,000 referred to in the bill of complaint as the consideration paid for the transfer of accounts (*fols. 18–19*).

The plea in bar was subsequently sustained by the District Court and on appeal to the Circuit Court was sustained there by a divided Court (*fol. 47*). The prevailing opinion being written by Judge WARD and concurred in by Judge COXE, Judge LACOMBE dissenting in an opinion (*fols. 59–65*).

Specifications of Error.

(1) The specifications of error assert that it was error to find that the trustee had ratified and approved the dealings between the bankrupt and Sugarman and was estopped from taking proceedings to set aside the fraudulent transfer.

(2) That it was error to find that the unsatisfied turn-over order was a bar to the action.

(3) That it was error to find that the proceedings to compel the bankrupt to turn over concealed moneys constituted an election barring the trustee from setting aside the fraudulent transfer (*fols. 73-74*).

POINTS.

I.

The proceedings upon which the plea in bar is based were merely possessory in character and were an attempt on the part of the trustee to get that possession of property held by the bankrupt to which he was entitled under the Bankruptcy Act.

On January 11th, 1905, the trustee filed a verified petition charging that the bankrupt was concealing from him assets amounting to $84,24[illegible].93 (*fols. 21-27*).

On January 12th the referee ordered the bankrupt to show cause why he should not pay this sum over to the trustee (*fol. 20*).

On February 15th, 1905, the bankrupt filed an answer to the petition (*fols. 28-31*).

Proofs were offered by both the trustee and the bankrupt, and on August 2nd, 1905, the referee found that the bankrupt had concealed assets amounting to $17,500, and ordered that he turn this amount over to the trustee within twenty days (*fol. 32.*) This order of the referee was reviewed by the District Court and affirmed on the 1st day of December, 1905 (*fols. 43-44*)

The testimony submitted at the hearings by both parties is epitomized in the certificate of the referee (*fols. 37-43*). All that need be noted in this testimony on this appeal is that the evidence shows that the estate was deprived of between fifty and one hundred thousand dollars, that the $30,000 paid by Sugarman for the transfer of accounts was included in making up the much larger amount of assets which were traced into the bankrupt's possession, and that the bankrupt, in showing the disposition he made of the total amount of assets, specifically explained the manner in which he had squandered $15,000 of this $30,000, which explanation, though not entirely satisfactory to the referee, was accepted (*fol. 40*).

It should be noted that the turn over order was never obeyed by the bankrupt and that the trustee has received nothing pursuant to it (*fol. 69*).

This proceeding was an assertion by the trustee of his right to possession of all property in the hands of the bankrupt as against the bankrupt. There was no assertion of a claim of title as against the world. If the turn over order had been obeyed, the ultimate disposition of what the trustee had received under it would have remained a subject for further determination.

When the trustee qualified all the property of the bankrupt vested in him. He was entitled to receive from the bankrupt, and the bankrupt was under the legal duty of delivering to him all assets, irrespective of their source.

National Bankruptcy Act, § *70*.

The trustee became the legal custodian of and entitled to the physical custody of all property of every kind in the bankrupt's possession.

The property belonging to third persons passed to the trustee pending the determination of owner-

ship. The bankrupt could not assert an outstanding title in anyone else as against his trustee.

Re Beall, Federal Cases, 1156; District Court of Mass., 1869.

Re Vogel, Federal Case, 16982; Circuit Court, Southern District of New York, 1869.

Matter of Moses, 1 Fed. Rep., 865; Dist. Ct., Southern Dist. of New York, 1880.

In re Smith, 100 Fed. Rep., 795; Dist. Ct., Southern District of Georgia, 1899.

The trustee took the property subject to all the rights of third parties, and in the same condition in which the bankrupt had it.

In re New York Economical Printing Co., C. C. A., 2nd Cir., 1901; 110 Fed. Rep., 514.

The turn over order is not a judgment or decree for the payment of money against the bankrupt, but a mere order for delivery of assets to the trustee. It is merely an assertion of possessory rights.

In re Schlesinger, C. C. A., 2nd Cir., 102 Fed. Rep., 117, 1900.

In brief, the trustee is entitled to the possession of all property which is in the bankrupt's possession. He takes it subject to the rights of third parties; he is the person against whom third parties shall bring their proceedings, and the person to bring proceedings against third parties. When the bankrupt is obdurate and the trustee has to apply to the Court to force his possessory right there is no change in the situation. If the

bankrupt conceals property he is guilty of a crime. *National Bankruptcy Act, Sec. 29 (b)*. One question, and one question only, is involved in the turn over order, *i. e.*, right to possession as against the bankrupt. Every question as to rights of third parties, or rights against third parties, remains subject to future determination and unaffected. This failure to note the purely possessory character of the turn over order, and to recognize that it is merely in aid of *§70 of the Bankruptcy Act*, is the principal vice in the prevailing opinion (*fol. 61*). Judge LACOMBE, in his dissenting opinion, calls attention to this error. He says (*fol. 64*):

> "It seems to me that a trustee in bankruptcy does not perform any act of election, of which some debtor of the bankrupt can take advantage, merely because he fulfills his statutory duty to possess himself of all the property in the bankrupt's possession at the time of the bankruptcy, as promptly as he can. It is conceded that if the bankrupt had kept the $30,000 in a private safe in some deposit company and upon learning of the appointment of the trustee had delivered it to the latter, receipt of it would not constitute an election, and I cannot see how the situation is changed by the circumstance that the bankrupt delivers it in obedience to an order to show cause, or turns over only part of it because he has squandered the remainder. It would seem to be a disastrous rule to apply that, whenever a trustee insists that a bankrupt shall turn over all the property in his possession, he thereby ratifies by election all sorts of transactions which the bankrupt may have had with the persons from whom he got the property, and I am not satisfied that the authorities cited require such an extension of the doctrine of election.

The situation of a trustee under the prevailing

opinion of the Circuit Court of Appeals, is indeed curious. He is entitled to the possession of all assets in the hands of his bankrupt by virtue of the Bankruptcy Act. If this possession is freely given him by the bankrupt, the majority judges would permit him to bring an action to set aside a fraudulent transfer, apparently irrespective of whether the assets came into his possession when he had knowledge that there had been a fraudulent transfer. But if the bankrupt is willing to commit a crime under the Bankruptcy Act and seeks to conceal assets, and his trustee invokes the aid of the Court to compel the bankrupt to perform the duty which the statute places upon him, and has knowledge that a part of these assets in the bankrupt's hands are the result of a fraudulent transfer, he cannot proceed against the transferee to have the transfer set aside, even though nothing comes into his possession under the Court order. Yet the order is clearly nothing more or less than a command of the Court that the bankrupt comply with the statute.

The only difference between the two cases is that, in one case the bankrupt voluntarily yields possession, and in the other case he does not yield possession, although ordered to do so. It is difficult to see on what principle an election can be predicated on this immaterial difference.

If the mere charging of the bankrupt with the consideration money is to amount to an election the trustee is not put in the position of the bankrupt as a preliminary to his assertion of the creditors' right to elect. He is required to weigh the value of the goods fraudulently transferred with the conjectural amount of the consideration value which can be proved to have been concealed by the bankrupt and he must again conjecture how much of the money which the bankrupt may be directed to turn over will actually be turned over.

Under these circumstances the trustee would hesitate to proceed in such a case, and as a practical matter he would seldom be justified in charging the bankrupt with receipts of a fraudulent transfer. This would create an exemption and the ground of the exemption would be that the exempt funds were procured by fraud at the expense of the creditors.

Under the decision below the trustee must refuse to perform his duty and let a recalcitrant bankrupt remain in possession of the proceeds of a fraudulent transfer in order to preserve his remedy against the fraudulent transferee provided he has knowledge of the fraud.

Such a view is contrary to the Bankruptcy Act (§ 70) which places in the trustee title to all property held by the bankrupt, and to the many of cases some of which we have cited, which declare that a trustee is entitled to the possession of all property in the possession of the bankrupt regardless of its final disposition.

It is also opposed to the effective administration of the Act in that it leaves a question as to the enforcement of creditors' rights to depend upon whether the bankrupt refuses to turn over assets in his possession and upon whether the trustee seeks to compel the bankrupt to turn over such assets by securing a court order.

Such a view is also contrary to the specific provisions of subsection (*e*) of § 70 which provides,

> "That a trustee may avoid any transfer by the bankrupt of his assets which any creditor of such bankrupt might have avoided."

The correct view undoubtedly is, that as to possion the trustee stands in the shoes of the bankrupt, but as to rights against fraudulent transferees he is clothed with the powers of a creditor.

In assuming possession either with the consent of the bankrupt or by virtue of a turn over order, he is a mere repository of the property held by the bankrupt. His title to that property is merely such as the bankrupt has. The bankrupt has ceased to have a legal right to possession of certain property. He is for the time civilly dead.

What the trustee does in the exercise of this function does not affect his powers as the representative of creditors to follow up a fraudulent transferee and set aside a fraudulent transfer. Recognition of this duality of duties and provinces and of the purely possessory character of the turn over order is all that is necessary to show the error below.

II.

The acts of the trustee in the proceedings upon which the plea in bar is based were not irreconcilable with the bringing of a suit against Sugarman to set aside the fraudulent transfer.

The doctrine of election of remedies applies only where the remedies asserted are irreconcilable.

Ency. of Law and Procedure, Vol. 15, p. 257, also p. 261.
Mills vs. *Parkhurst, 126 New York, 89, p. 93.*
Matter of Garver, 176 New York, 386.

It is stated in the *Ency. of Law and Procedure, Vol. 15, p. 261,* under the title of Election of Remedies, that

> "No act is decisive so as to constitute a conclusive election unless the remedial right

> upon which such act is based is irreconcilable with the remedial right which a subsequent action or suit is brought to enforce."

In Mills vs. *Parkhurst* (*126 New York, 89*), decided in 1891, (GRAY, *J.*, at p. 93, says:

> "The doctrine of election, usually predicated of inconsistent remedies, consists in holding the party to whom several courses are open for obtaining relief to his first election; where subsequently he attempts to avail himself of some further and other remedy not consistent with, but contradictory of his previous attitude and action upon his claim. The basis of the application of the doctrine is in the proposition that where there is, by law or by contract, a choice between two remedies which proceed upon opposite and irreconcilable claims of rights, the one taken must exclude and bar the prosecution of the other."

As we have shown in Point I the turn over order is simply an effort of the trustee to possess himself of the property in the possession of the bankrupt which the bankrupt did not deliver pursuant to the Bankruptcy Act. In procuring this order the trustee was attempting to perform that portion of his functions which require him to take possession of the bankrupt's property and vest himself with the possession of the bankrupt to that property.

Had the trustee secured the funds in the bankrupt's possession he could then determine whether or not to avail himself of the right of a creditor to set aside the fraudulent transfer which is given by § 70, subsection (*e*). Not until he got into his possession the proceeds of the fraudulent transfer would he be in a position to tender back to the transferee any portion of the consideration of the transfer or to comply with a decree which might require the return to the transferee of all or a por-

tion of the consideration paid. The prosecution of the turn over order was not inconsistent with a subsequent suit to set aside the fraudulent transfer. On the contrary, it was a proper preliminary to such a suit.

Had the order been complied with and had the trustee paid out to the creditors and the creditors received with full knowledge, the proceeds of the fraudulent transfer as dividends, the case might then be such a case as the prevailing judges of the Circuit Court of Appeals apparently had in mind. But here there was an absolute failure to comply with the turn over order. Nothing was paid to the trustee under it, hence nothing could have been paid to the creditors under it (*fol. 69*).

Furthermore, it does not appear that the trustee has ever paid out a penny of any sums received from Sugarman in dividends.

The statement of the prevailing judges that the trustee was seeking to get the money as a part of the bankrupt's estate to be distributed among creditors is not borne out by the record and is negatived by the fact that the trustee elected to proceed to set aside the transfer.

When the trustee was seeking to get into his possession the bankrupt's assets the time had not come for him to decide whether he should pay them out in dividends and affirm the transaction with Sugarman or proceed in disaffirmance of that transaction. That determination he could properly make only when he had made every effort to get the assets into his possession, and his election to proceed in affirmance of the Sugarman transaction could only be evidenced by some act inconsistent with the suit to set aside the transfer.

No act was done which was inconsistent with either course. Every act of the trustee is as consistent with a disaffirmance of Sugarman's transfer

as with its affirmance. He had not reached the point where the roads divided.

Any argument that during the turn over proceedings the trustee intended to adopt one course or the other is outside the record. His intention may have varied from day to day, but so long as he committed no irreconcilable act, either course remained open to him. In demanding the possession which properly follows the title conferred upon him by the Bankruptcy Act there was no adoption of a binding course of action, either as to the bankrupt, or third parties. It was a purely ministerial act. It follows that there could have been no election in the proceedings before the referee because those proceedings are clearly reconcilable with the suit subsequently brought.

III.

The trustee did nothing which will bar the claims of creditors.

In *Bowdish* vs. *Page* (*153 New York, 104*), GRAY, *J.*, says (*p. 110*):

> "The plaintiff, as an assignee for the benefit of creditors, was not in a position to exercise such an election. In his capacity as a trustee for others, he could not forfeit their rights in the prosecution of some further remedy, as to the existence of which he had been advised. It would not do to hold the broad doctrine that one occupying the position of a trustee could impair or destroy the vested beneficial interests of his *cestuis que trustent*, upon the theory that, in his efforts in behalf of the trust estate, he had made an election of an inconsistent remedy."

It is not necessary to adopt so broad a rule as this to sustain the appellant's contention.

All that is required is a recognition of the double function which a trustee exercises to which we have previously referred. While acting as a representative for all parties and vested with the title to all the bankrupt's property and seeking to secure the possession of that property the trustee is no more the representative of the creditors than he is the representative of the bankrupt.

In whatever he does in this capacity he does not take sides.

When, however, he adopts the right of a creditor and commences proceedings against third parties he has taken sides and his acts might then constitute an election, as to a fraudulent vendee if ratified by the creditors, or made under no mistake of fact, or very clearly inconsistent with his subsequent attack upon the vendee.

In Furness vs. *Ewing* (*2 Pa. St., 479*), the debtor while insolvent made a conveyance to his son in consideration of future maintenance and an annuity for life. Subsequently the debtor made an assignment for the benefit of creditors. The assignee with the knowledge of the creditors collected up to the debtor's death the instalments of the annuity, and the money so collected was distributed among the creditors. Upon the death of the debtor his administrator brought trover for the goods fraudulently conveyed. Ratification of the conveyance by reason of the facts above given was urged as a defense to the action.

The Court held that even though the assignee had accepted the annuity, the receipt of which was inconsistent with the claim of title to the fraudulently conveyed property the creditors might have rejected it by objecting to its being charged as a part of the funds at the settlement of the accounts,

but that the assignee with the assent of the creditors might ratify it and had ratified it.

The case clearly proceeds upon the ground that the collection of the instalments by the assignee would not bar creditors from their right to proceed for goods fraudulently conveyed unless the creditors themselves shared in the proceeds of the assignee's collection or ratified it.

In *Butler* vs. *Hildreth* (*46 Mass., 49*), the vendee gave notes to the vendor for goods fraudulently conveyed. Plaintiff was assignee of the vendor under the State Insolvent Law. Plaintiff brought suit against the vendee on the notes and attached the vendee's property. Later plaintiff brought suit in trover against the vendee for the goods themselves.

It was held that the plaintiff knowing all the facts when he brought the first action and being entitled to maintain the first action was barred from bringing his second action.

SHAW, *C. J.* (*p. 51*), says:

> "It would, we think, be going too far to say, that merely demand of the price should be deemed a waiver of his rights to avoid the sale and claim the goods, because in many cases if the price could be obtained, it would be equally beneficial to all the creditors, and he would have no further occasion to pursue the harsher remedy of impeaching the sale. But we think that if the assignee commences an action against the purchaser for the price and causes his property to be attached to secure it, this is a significant act, an unequivocal assertion that he does not impeach the sale, but by necessary implication affirms it. It is an act, too, deeply affecting the rights of the purchaser, whilst it is an assertion of his own; and if done with a knowledge of all the facts which ought to influence him in his election it is conclusive.

> But this determination will not extend to a case where facts subsequently come to the knowledge of the assignee, which, if he had known them before, would have led him to a different election, whether these facts relate to the character of the sale and bear upon the question whether it was fraudulent or not, or whether they relate to the remedy. As if the assignee on commencing his action for the price believes that he has secured the amount due by an invalid attachment of the defendant's property and afterwards discovers that it is not the property of the defendant, and that his supposed remedy has failed or if he should discover that the defendant had an offset which would be good against an action of assumpsit for the price, but not good against an action of trover. If, on any of these grounds, it should appear that he had made his election under a mistake of facts and more especially if he had been led into such mistake by the adverse party, it might present the question in a different view. But no mistake of fact of any kind was suggested in the present case, nor precluded by the directions of the Judge."

Applying the language of Chief Justice SHAW to the case at bar, it appears:

That there can be no election which would be a bar because the mere demand for payment of the price of the goods fraudulently sold is not sufficient to be deemed a waiver of the right to avoid a sale. The demand referred to in the case cited is a demand for the unpaid price upon the fraudulent vendee. In our case, no demand whatever was made against the fraudulent vendee but the vendor was ordered to turn over what he had in his possession.

Again, assuming that in the case at bar the trustee actually meant to attack the proceeds of the transfer in the hands of the bankrupt believing

that the money had not been squandered by the bankrupt, his mistake of fact as to the vendor having the proceeds in his possession would prevent his action from being a bar to the suit to set aside the transfer.

In the case cited, two plainly inconsistent suits were brought against the vendee while in the case before the Court no action was brought against the vendee, no demand made of him. These three cases from the three States of New York, Pennsylvania and Massachusetts and particularly the opinion of the emident Judge who decided the Massachusetts case, illustrate the hesitancy with which the doctrine of election should be applied when it is sought to bar creditors by reason of the action of their legal representative. The New York case indicates that a trustee cannot bar creditors by an election; the Pennsylvania case, [illegible]at his action does not bar the creditors unless they ratify it, and the Massachusetts case, that in order to bar creditors the representative's acts must be plainly inconsistent with his suit to set aside the fraudulent transfer, and that to demand the proceeds of the fraudulent transfer even from the vendee is not sufficient and that the acts which are sought to be construed as constituting a bar may not be committed by the trustee under a mistake of fact.

A rule well within the decision in each of these cases and determinative of the present case may be deduced from them, viz., that where the act relied upon as constituting an election is that of the representative of creditors, a distinct and clear case within the doctrine of election must be made out because the rights of creditors, ignorant of the facts are in question.

The case at bar is an attempt to extend the doctrine of election of remedies to cover a state of facts to which it has never before been applied.

Such extension should not be allowed in a case where the acts were those of a trustee and the claims sought to be barred those of innocent creditors, or we may say, *cestuis que trustent.*

IV.

There is no authority which supports the decision below.

It is apparent that no equitable estoppel is involved in this case. The trustee took no step and was guilty of no omission upon which Sugarman could in the least rely, or which could in the slightest degree tend to affect his actions or even his beliefs.

The doctrine of election of remedies seems to have developed from the doctrine of equitable estoppel. Indeed, some Courts have gone the length of holding that to bar a creditor from setting aside a fraudulent transfer made by a debtor the elements of equitable estoppel must be present.

Jenness vs. *Berry, 17 N. H., 549;*
Robbins vs. *Worten, 128 Ala., 373, page 379.*
Woods vs. *Potts, 140 Ala., 425.*

The difference between equitable estoppel and election is that in the latter case the mere adoption of a specific irreconcilable position or remedy takes the place of the acts or omissions and the consequent reliance thereon by the other party, which constitutes estoppel. The doctrine of election is merely a short cut to the same result.

An elaborate search shows that no case has gone the length of applying the doctrine of election of

remedies so as to bar a trustee and creditors upon facts such as are here presented. We refer to some of the cases which have gone farthest toward creating the bar for the purpose of illustrating exactly what the principle is upon which the doctrine of election proceeds.

In *Butler* vs. *O'Brien, 5 Ala., 316*, the creditor attached the goods in the hands of the vendee as belonging to the debtor. Subsequent to attachment the creditor accepted in part payment from the debtor a note of the vendee given in consideration of the sale and had transferred this note to a *bona fide* holder. The Court held that the plaintiffs could not appropriate the note with knowledge of the facts and also proceed against the goods for the residue of their demand. This illustrates a large class of cases where the creditor proceeds to enforce the payment of the consideration given for the fraudulent transfer by the vendee. The creditor practically makes himself a party to the transaction. This is entirely different from seeking to obtain property which is in the hands of the vendor, having been paid to him by the vendee in a transaction which has been fully executed.

Torreyson vs. *Turnbaugh, 105 Mo. App., 439.*

In this case the creditor practically enforced payment from the fraudulent vendee. He was not barred, because he attached the consideration already paid, which was in the hands of the debtor, but because he consented to the sale and became a party to the execution of the fraudulent sale.

In *Krumbaugh* vs. *Kugler* (*3 Ohio St., 544*), the vendee agreed to pay the vendor's creditors and executed a mortgage to secure them. The creditors surrendered the notes of the vendor and took the notes of the vendee. The creditors were held

to be precluded from impeaching the sale between the vendor and vendee. Here election is predicated upon an assent in fact and a novation.

Furness vs. *Ewing, 2 Penn. St., 479.*

Here the election consisted in collecting the consideration from the vendee and in participating in and becoming parties to a transfer not yet completely executed.

Millington vs. *Hill, 47 Ark., 301.*

This was another case in which the creditor sought to recover from the vendee the consideration given for the transfer, and then to set aside the sale itself. Having assumed one position toward the vendee, he could not change his position.

Cunningham vs. *Campbell* (*3 Tenn. Ch., 708*) was a case in which pursuit of the vendee on the consideration note was held inconsistent with the attempt to set aside the sale.

All these cases where a creditor has been held to become barred fall into the following classes:

A.—Where he has been a party to the conveyance.

B.—Where he has been a party to the payment of the consideration by the vendee.

C.—Where he has by his conduct induced the vendee to rely upon the validity of the payment.

D.—Where he has pursued the vendee upon the consideration note or in supplementary proceedings.

There is no case in which the creditor has been held barred, where, as, in the suit at bar he has not

participated in the sale, in the payment and receipt of the consideration from the vendee, in the pursuit of the vendee for the consideration, or induced the vendee to rely upon the validity of the payment.

On the contrary, there have been a number of cases which hold that by merely proceeding against the proceeds of the executed sale in the hands of the debtor the creditor simply attacks that property as he would any other property which belonged to the debtor, and is not barred from attacking the sale thereby. The theory being that the vendee being a guilty participant in the fraudulent transaction, and the fraudulent transaction having been executed, the title of the vendor to the consideration received from the sale is good against the vendee and every one except creditors, and the fruit of the fraudulent transfer is not exempt from attack by the creditor just because this particular property is the proceeds of a fraud.

Goldnamer vs. *Robinson, XI Ky. L. Reports, 630.*

Here the debtor after making a fraudulent transfer assigned for the benefit of creditors. Funds received from the fraudulent purchaser were distributed among creditors including the plaintiffs who later brought a suit to attach the property fraudulently transferred as property of the debtor. It was insisted that the attaching creditors were estopped from claiming the property attached. The Court held that the goods levied upon were the property of the debtor. The attaching creditors were not estopped and the fraudulent purchaser had no rights which they were bound to respect.

Pulsifer vs. *Waterman, 73 Main, 233.*

Here the creditor brought suit against a fraudulent vendee for a statutory penalty for assisting in

the scheme to defraud creditors. The creditor had already received a dividend from the estate of the vendor and that estate had been enriched by the assistance of the vendee. The Court held that the creditor was not estopped to bring such an action.

Briggs vs. *Merrill, 58 Barb., 389, New York.*

Here the fraudulent vendee gave his promissory note to the debtor in part payment. The creditor procured the delivery of this note, in supplementary proceedings against the vendor, to a receiver, who continued to hold it. The creditor then brought proceedings to set aside the sale. The Court held that the note was not enforcible, except in the hands of the holder in due course and continued (*p. 399*):

> "But even had the note been a valid security, and collectible in the hands of the receiver, the discovery and delivery of it into his hands, could not by any possibility, in my judgment, have produced the legal results adjudged by the ruling at the Circuit. *Had it been a chose in possession, instead of a chose in action, I do not see why the defendant might not have taken it by virtue of an execution or proceedings supplementary, without relinquishing his right to take the property in question.* As between the parties to that bargain, the trade would have been good as against all the world except the creditors of one of the contracting parties. As between themselves, each would have acquired a complete and perfect title to the property received by him in the transaction, as against the other. But as regards a creditor of one of the parties, the title of him who takes from the debtor does not vest, as against such creditor, and the creditor may levy upon the property and contest the title. The transaction is void as to

creditors, and the title still remains in the debtor as to them. The creditor may, therefore, take it in satisfaction of his debt by regular process, as has always been held, if he can establish the fraud. As to the property which the debtor receives from the other party to the fraudulent contract or exchange, it is his to all intents and purposes, as against the other party and all the world.

The other party to the transaction could never reclaim it by any legal proceeding, as the law would afford him no aid, and would not hear him allege that he had parted with it to aid in defrauding another. In every such case the party bargaining with a debtor, with such intent, does it at the peril of having that which he receives taken from him by the creditors of the debtor whom he is attempting to defraud, without having any remedy to recover what he parts with in carrying out the bargain. The law will leave him in the snare his own devices have laid. The property thus received by the debtor being his exclusively, the law devotes it to the payment of his debts, where ever it can be reached by legal proceedings on the part of his creditors. *The law will not allow him to retain it, and use it, in defiance of his creditors, because he acquired it by a fraudulent attempt to deprive them of their rights. It gives no such aid and comfort or protection to any party to a transaction entered into for such a purpose* "

It should be noted that in the case cited the creditor got possession of the proceeds of the transfer, or at least the receiver got this possession, and then the creditor was permitted to claim the goods in the hands of the vendee.

In the case at bar the trustee got no possession of the consideration money.

The case at bar is a very much stronger case for the creditor than the case cited.

Arnold vs. *Hoschildt, 69 Minn., 101.*

Here the creditor was also a mortgagee of the land which was fraudulently conveyed. After the conveyance the creditor received payment of the mortgage from the vendee. The Court held that this did not estop plaintiff from attacking the conveyance on the ground of fraud, but provided in the decree that the vendee should be protected to the extent of the amount paid the creditor, and that the plaintiff's lien upon the land should be declared subsidiary to the vendee's right to be subrogated to the rights which the plaintiff had as mortgagee before the mortgage was paid.

Kells vs. *McClure, 69 Minn., 60.*

Here the debtor made a fraudulent conveyance of lumber receiving in return notes of the vendee. The vendor then assigned for the benefit of creditors, and the notes were delivered to the assignee. The assignee brought suit to set the transfer aside.

START, *C. J.*, held that the fact that the notes came into the hands of the assignee would not be a ratification of the transfer by the creditors, and declared that it was competent for creditors to elect to avoid the sale or affirm the sale by pursuing the property which their debtor acquired in exchange for that which he sold and cites two cases.

Lemay Bibeau, 2 Minn., 251;
Hathaway vs. *Brown, 22 Minn., 214.*

Reference to these cases shows that what the Court says about affirming the sale by pursuing the property which this debtor acquired means pursuing as against the vendee what he had agreed to pay as the purchase price for the property transferred.

See also

Barker vs. *Philip, XI Rob. (La.), 190;*

Bonnie & Co. vs. *Perry's Trustee, 117 Ky., 459.*

This line of cases brings out strongly the rule, that where the fraudulent sale has been fully executed, a creditor is not barred from setting the sale aside, because he gets possession of the proceeds of the sale from the debtor-vendor.

The case of a trustee vested by law with the debtor's title seeking to perform his duty of getting possession is much stronger than the case of an attacking creditor.

There is also a distinction as affects an election between a proceeding brought against a vendee and a proceeding brought against the insolvent vendor which is very favorable to the contention of the appellant.

We submit with confidence that in a case like ours, where nothing is received from the vendor, and where the attempt to get assets from him is a Court order in assistance of § 70 of the National Bankruptcy Act, of a mere possessory character, where the creditors have received no benefit therefrom and no steps of any kind have been taken against the vendee, there cannot be an election which will bar creditors' claims or will bar the trustee when he proceeds as the representative of creditors to set aside a fraudulent sale.

An examination of the authorities hitherto relied upon by fraudulent transferee indicates the weakness of his position.

Robb vs. *Vos* (*155 U. S., 13*) is a case where the plaintiffs were mortgagees. The creditors of the mortgagor filed a bill to have the land sold and the equity applied to pay the mortgagor's debts. The attorneys for the plaintiffs consented that the plaintiff's interests should be sold and the value

paid out of the proceeds. The proceeds were received by the attorneys and converted by one of them who mortgaged his property to the other as security against any liability which might arise through the acts of the former. The defaulting attorney then died and his administrator brought a suit against the other attorney to reach the land conveyed by the mortgage. The defendant asserted that the plaintiffs were necessary parties. Plaintiffs appeared and set up a claim to the land and mortgage as security for the money converted. Later plaintiffs withdrew this claim and filed a demurrer on the ground that they were not proper parties. The demurrer was sustained. Then the plaintiffs sued the vendees of the land upon which they had formerly held the mortgage claiming that the attorneys had no authority to appear for them in the suit by the creditors, nor to consent to a sale and asking that a lien in their favor be declared on the land.

The Court held that by their action in the suit brought by the administrator and the filing of the cross petition therein they ratified the acts of their attorneys and were estopped as against innocent third parties whose opportunity to pursue the estate of the embezzling attorney had been prejudiced. This is clearly a case involving, first, ratification of the acts of the ostensible agent, and, secondly, it presents the elements of estoppel.

Sickman vs. *Abernathy* (*14 Colo., 174*). Here the debtor sold the property and the creditor acquiesced in the sale and attacked the consideration supposed to be due from the vendee and was thereafter held barred in the proceedings to set aside the sale.

This is the ordinary case of election.

Butler vs. *Hildreth* (*9 Met., 46*). This is a case where suit was first brought against the vendee to

enforce payment of the consideration which was held to bar a later suit to set aside the sale.

Hathaway vs. *Brown* (*22 Minn., 214*) presents a similar state of facts.

Fitts vs. *Beardsley* (*8 New York Supp., 567*) was a case in the general term of the Supreme Court where a receiver in supplementary proceedings sought first a personal judgment against the transferee which he secured, and was held to be barred from a later proceeding to set aside the conveyance.

Rennick vs. *Bank of Chillicothe* (*8 Ohio Rep., 529*) is a case where the creditor with knowedge of all the facts contracted with the vendee to receive the full value of the land from the vendee in full or part satisfaction of the vendor's debt. Payments were made pursuant to this contract which expressly recognized the sale as valid. The creditor was subsequently properly held to be barred from proceeding to set aside the sale.

Butler vs. *O'Brien* (*5 Ala., 316*). Here the creditor attached goods as property of the vendor and then received from the vendor the consideration note given by the vendee.

This is a very good illustration of the doctrine of election as applied to creditors, viz., if the creditor with knowledge makes use of the note of the vendee he is barred from later reaching the goods. In other words, after having attempted to enforce the payment by the vendee and become a party to the sale, he cannot move to set it aside.

Millington vs. *Hill* (*47 Ark., 301*). A case of enforcing against the vendee the consideration note given for the transfer.

Crook vs. *Bank* (*83 Wis., 31*). The doctrine of election is applied here to a case where a bank wrongfully paid out the money of the plaintiff to a third person. The plaintiff sued the third per-

son *ex c ntractu* and recovered judgment on the theory that the third person was his agent to receive the money. This is plainly an affirmance of the payment by the bank. There is an element of estoppel here, as the plaintiff is alleging a wrongful payment and the bank is lulled into not asserting any claims against the person to whom the money was paid.

Fowler vs. *Bowery Savings Bank* (*113 New York, 450*) is substantially the same as the preceding case.

Dietz vs. *Field* (*10 App. Div., 425*). Here a pledgee of securities repledged them for a greater amount. The pledgor sued for conversion and recovered judgment. He was properly held to be barred from bringing a later suit to recover the specific securities from the pledgee.

Cobb vs. *Hatfield* (*46 New York, 533*). This was a case where plaintiff subscribed for stock in a corporation, received the stock, retained it, and after discovering that there had been a fraud brought suit for rescission of the contract without offering to restore what he had received. It has no application to election of remedies and is a clear case of estoppel.

Terry vs. *Munger* (*121 New York, 161*). This case must be considered with *Goodwin* vs. *Griffiths* (*88 New York, 629*), of which it is the sequel.

In the latter case suit was brought against the Sheriff for the escape of a prisoner held by virtue of a body execution. The County Judge had made an order releasing the prisoner. The question was whether the County Judge had jurisdiction to grant the discharge, and this depended upon whether the judgment upon which the execution was issued was founded on a cause of action *ex contractu* or *ex delicto*.

Goodwin and Terry, the plaintiffs in both actions

had been in partnership with Kip. The partnership was dissolved and the partners held as tenants in common. Kip then entered into a copartnership with two other partners and with his new partners carried away machinery which belonged to the former partnership. Goodwin and Terry sued Kip and one of his new partners asking for the value of their interest in the property. They secured judgment, issued execution against the body of Kip's partner, and the County Court ordered his release, the Sheriff obeyed the order, and the plaintiff sued the Sheriff for an escape.

The Court said that the action was *ex contractu*, as for a sale, and that the County Court had jurisdiction to release the prisoner, and the action against the Sheriff failed.

Seven years later Terry and Goodwin brought a suit against Kip's other partner, which is the case of *Terry* vs. *Munger* (*121 New York, 161*). This was a suit for conversion arising out of the same transaction and based on the same facts. PECKHAM, *J.*, at *page 166*, said:

> "The plaintiffs having treated the title to the property as having passed to the defendant in that suit by such sale, can plaintiffs now maintain an action against another person who was not a party to that action to recover damages from him for his alleged conversion of the said property where the conversion is founded upon his participation in the same acts which plaintiffs in the old suit have already treated as constituting a sale of the property? We think not."

In the first case the Court was confronted with the alternative of declaring the action to be *ex contractu* or permitting a recovery from the Sheriff for obeying a Court order.

In the second action the Court felt itself bound

by the construction it had previously put upon the complaint in the first case.

The three partners of the new firm all stood in the same position regarding the transaction in question. Accepting the Court's theory of the two actions as correct, there was a manifest irreconcilability between suing for a sale and for conversion when both suits were based on the same facts and directed against the defendants as partners of the same firm.

Not one of the appellee's authorities supports his contention that there has been an election by the trustee in bankruptcy in the case at bar.

V.

There could be no election under the allegations of the bill of complaint.

The bill of complaint alleges that Sugarman and the bankrupt entered into a fraudulent scheme and conspiracy with intent on the part of both to hinder, delay and defraud the creditors of the bankrupt. That Sugarman had full knowledge of the fraudulent intent and insolvent condition of the bankrupt, etc. (*fol. 5*).

Under these allegations Sugarman had no right of action against the trustee and no right of action against anyone else by reason of the fraudulent transfer. He was *in pari delicto* with the bankrupt and the Court would leave him where it found him.

Wheeler vs. *Sage, 1 Wall., 518;*
Selz vs. *Unna, 6 Wall., 327;*
Railroad Co. vs. *Sutter, 13 Wall., 517;*

Mullen vs. *Hoffman, 174 U. S., 639;*
Goodrich vs. *Houghton, 134 New York, 115.*

As he had no rights regarding the funds in the hands of the bankrupt, there could be no detriment to him in the trustees merely seeking to get actual possession of these funds legal title to which had already vested in the trustee.

Defendant Sugarman being actually fraudulent, he would not be entitled, upon final judgment against him for the property transferred, to have credit for the money he had paid the vendor.

Lynch vs. *Burt, 132 Fed. Rep., 417;*
Johnson vs. *Forsyth, 127 Fed. Rep., 845;*
Burt vs. *Gotzian, 102 Fed. Rep., 937;*
Baldwin vs. *Short, 125 New York, 553, 559, 560;*
Fowler vs. *Deering, 9 App. Div., 220;*
Conde vs. *Hall, 92 Hun, 335.*

Johnson vs. *Forsyth* (*District Court, S. D. Ga., 1904, 127 Fed. Rep., 845*) may profitably be considered on this question. In this case the trustee in bankruptcy brought suit to set aside a fraudulent sale. A special demurrer was filed by the vendee claiming that relief should be denied because the complainant did not offer to refund the proceeds of the sale.

SPEER, *D. J.* (*p. 848*), says:

> "With regard to the special demurrer that the complainant should have tendered the purchase price before he can be heard, it is sufficient to say that the rule which the defendant invokes is not applicable. This is not a proceeding between a vendor and vendee where it is sought to set aside a sale for

> inadequacy of price. It is a proceeding by the representative of creditors attacking a transaction alleged to have been made to hinder and delay them, and absolutely fraudulent as to their rights. The trustee, then, certainly at this stage of the case, is under no obligation to tender the purchase price paid by one of the alleged wrongdoers in order to protect it from loss. On final decree, even if the complainant succeeds in sustaining his contention, it may be the duty of the Court to preserve, as far as possible, the defendant from sustaining loss. This, however, is a matter for future determination, and certainly *the prayer of the trustee in bankruptcy will not be denied in limine because he was unable or unwilling to tender money to the defendant* which it is alleged to have paid out in furtherance of a fraud against the rights of creditors."

The case cited permits the trustee to hold the consideration and bring a suit to set aside. It is stronger than our case, where the trustee tried to get the consideration into his possession and failed, and then brought suit.

If under this aspect of the bill of complaint the fraudulent transferee cannot have any rights regarding the consideration given by him for the fraudulent transfer upon final judgment setting the sale aside, there would be nothing inconsistent in the appropriation by the trustees and the creditors of the proceeds of the executed fraudulent transfer which they found in the hands of the bankrupt, with a suit to set aside the transfer.

Consequently there could be no election in such a case.

Here no use was made of the proceeds of the fraudulent transfer. They were vested in the trustee by law. The bankrupt did not turn over possession to the trustee and the trustee got an

order from the Court requiring him to do so, which the bankrupt did not obey.

Upon these facts and under this phase of the bill of complaint the decision below is absolutely erroneous.

Under the fraudulent conspiracy charge in the complaint, the bankrupt and Sugarman are jointly and severally liable to the trustee. The pursuit of one and the gaining of judgment against him where that judgment is not satisfied would not bar action against the other.

Watts vs. *British Co.* (*C. C. A., 6th Ct., 60 Fed Rep., 483*);
Lovejoy vs. *Murray, 3 Wall., 1;*
Russell vs. *McCall, 141 New York, 437;*
Osterhaut vs. *Roberts, 8 Cow., 43;*
Preston vs. *Hutchinson, 29 Vt., 144.*

In view of the fact that the turn over order was not obeyed by the bankrupt the doctrine of election cannot be validly asserted against the trustee in his attack upon Sugarman. The allegations of fraudulent conspiracy place the case within a well-defined exception to the doctrine of election.

VI.

The Appeal.

This is an appeal from a final decision of the Circuit Court of Appeals in a suit in equity involving more than $1,000, besides costs (*fols. 1–7, 65, 67–70–77*). It is taken under § 6, Chap. 8 A of the Judiciary Act (*Act of March 3, 1891, Chap. 517, § 6, 26 Stat., 828*) which provides:

"That in all cases not hereinbefore in

> this section made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States, where the matter in controversy shall exceed $1,000, besides costs. But no such appeal shall be taken * * * unless within one year after the entry of the order, judgment or decree sought to be reviewed."

This is not a case where the decision of the Circuit Court of Appeals is made final by § 6.

It was taken within one year of the decision of the Circuit Court of Appeals (*fols. 69–70*). The petition for appeal was granted by Judge WARD. one of the prevailing Judges in the Circuit Court of Appeals (*fol. 70*).

VII.

CONCLUSION.

The determination of the Circuit Court of Appeals should be reversed and the plea in bar overruled.

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January, 1910.

Supreme Court of the United States.

APPEAL FROM

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

EDWARD S. THOMAS, AS TRUSTEE IN BANKRUPTCY OF CHARLES I. LIGHTSTONE, BANKRUPT,
Appellant,
against
SOLOMON M. SUGARMAN,
Appellee.

No. 131.
October Term,
1909.

REPLY BRIEF FOR APPELLANT.

WM. SIEGRIST, LAW PRINTER, 148-149 WORTH ST., NEW YORK

Supreme Court of the United States.

EDWARD S. THOMAS, as Trustee in Bankruptcy of Charles I. Lightstone, Bankrupt,
Appellant,

against

SOL. M. SUGERMAN,
Appellee.

Appellant's Reply Brief. October Term, 1909. No. 131.

The Appeal Was Properly Taken.

By the amendment of February 5th, 1903 (32 Stat., 797, C-487) there was added to subdivision (*e*) of Section 67 of the Bankrupt Act which provided for the setting aside of fraudulent conveyances and the recovery of property by suit of a trustee the words :

> "For the purposes of such recovery any Court of bankruptcy as hereinbefore defined, and any State Courts which may have had jurisdiction if bankruptcy had not intervened shall have concurrent jurisdiction."

By this section the District Court took jurisdiction of the case at bar.

Prior to the amendment of 1903 such a suit in equity could not have been brought in the District Court except by the consent of the defendant.

Bardes vs. *Hawarden Bank* (*178 U. S., 528*).

The effect of the amendment was merely to add another type of case to those governed by the Judiciary Act.

Jurisdiction having been first properly obtained this equity action is subject to the same rules regarding procedure and appeal as any other equity action, viz.:

Section 6, Chap. 8 (A) of the Judiciary Act (Act of March 3rd, 1891, Chap. 517, §6, 26 Stat., 828), which provides:

> "That the Circuit Courts of Appeal established by this Act shall exercise appellate jurisdiction * * * and the judgments or decrees of the Circuit Courts of Appeal shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, under the Revenue Laws and under the criminal laws, and in Admiralty cases. * * *
>
> In all cases not hereinbefore in this section made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed."

The case is not one in which the decision of the Circuit Court of Appeals is made final either because of the facts upon which jurisdiction depends or the nature of the case.

The appeal is allowed by this section, and is not prohibited by any provision of the Bankruptcy Act.

Section 24 of the Bankruptcy Act provides that:

> "The Supreme Court of the United States, the Circuit Courts of Appeal of the United States, and the Supreme Courts of the Territories, in vacation in chambers and during their respective terms, as now or they may be hereafter held are hereby invested with Appellate Jurisdiction *of controversies arising in bankruptcy proceedings* from the Courts of bankruptcy from which they have appellate jurisdiction in other cases."

This section has nothing to do with appeals from the Circuit Court of Appeals to the Supreme Court in equity cases. It simply confers jurisdiction "of controversies arising in bankruptcy proceedings."

The case at bar is not a controversy arising in a bankruptcy proceeding. It is a suit in equity in which one party happens to be a trustee in bankruptcy.

In Hewit vs *Berlin Machine Works* (*194 U. S., 296*), a Trustee in Bankruptcy applied to the District Court for leave to sell certain property. The Berlin Machine Works filed a petition praying that it be declared the owner of the property or that it be declared entitled to be first paid out of the proceeds of the sale of the property. The District Court reviewed the referee's decision, and the trustee then filed a petition in the District Court applying for revision and review, and also appealed to the Circuit Court of Appeals. The District Court at the same time ordering "that a superintendency and revision and review in matter of law and an appeal be and the same hereby is allowed in the above-entitled proceedings to the Circuit Court of Appeals."

Mr. Chief Justice FULLER, said (*at p. 299*):

> "If the trustee had carried the case to

the Circuit Court of Appeals on petition for supervision and revision under §24 *b* of the Bankruptcy Law (30 Stat. at L., 533, Chap. 541, U. S. Comp. Stat., 1901, p. 2432), the case would have fallen within *Holden* vs. *Stratton* (*191 U. S., 115*), *ante 116; 24, Sup. Ct. Rep., 45*, and the appeal to this Court would have failed. But he took it there by appeal, though accompanied by some apparent effort to avail himself also of the other method. And as the Berlin Machine Works asserted title to the property in the possession of the trustee by an intervention raising a distinct and separable issue, the controversy may be treated as one of those 'controversies arising in bankruptcy proceedings' over which the Circuit Court of Appeals could, under §24*a*, exercise appellate jurisdiction as in other cases. §25*a* relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required (*Holden* vs. *Stratton*, *191 U. S., 115, ante 116; 24 Sup. Ct. Rep., 45*), while §24*a* relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction vested in them at law and in equity by §2 to settle the estates of bankrupts, and to determine controversies in relation thereto (*Hutchinson* vs. *Otis, 190 U. S., 552; 47 L. Ed., 1179; 23 Sup. Ct. Rep., 778; Burleigh* vs. *Foreman, 125 Fed., 217*).

The appeal to this Court then followed, under § 6 of the Act of March 3, 1891 (26 Stat. at L., 828, Chap. 517, U. S. Comp. Stat., 1901, pp. 549, 550)."

As stated in the opinion "§25*a* relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respects of which special provision therefor was required." §25*a* provides that:

"Appeals, as in equity cases, may be

taken *in bankruptcy proceedings* from the Courts of Bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the Territories, in the following cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered and may be heard and determined by the Appellate Court in term or vacation as the case may be.

(*b*) From any final decision of a Court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

(1) Where the amount in controversy exceeds the sum of two thousand dollars and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or,

(2) Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States."

The case at bar is not an appeal in a bankruptcy proceeding or in any step of a bankruptcy proceeding. It has no connection with bankruptcy proceedings except the fact that the plaintiff is a trustee in bankruptcy.

General Order No. 36 has no application to the case at bar; it provides (§ 2):

"2. Appeals *under the act* to the Supreme

> Court of the United States from a circuit court of appeals or from the Supreme Court of a territory, or from the Supreme Court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.
>
> 3. In every case in which either party entitled by the act to take an appeal to the Supreme Court of the United States, the Court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts and the conclusions of law."

The words "under the Act" limit the application of this general order to such appeals as are provided for in Section 25*a*, in which category the case at bar is not included.

Appellee's contention seems to be that this general order limits the right of appeal granted by the judiciary act. It was, of course, never intended that the general order issued pursuant to the limited authority of Section 30 should be construed to limit a right of appeal which has been expressly determined by statute.

The Act itself distinguishes suits between a trustee and third parties from proceedings in bankruptcy by § 23 and § 23 (*b*) provides that :

> "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought

> or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under section sixty, subdivision b and section sixty-seven, subdivision e.*"

This seems to be a declaration that suits brought by a trustee under Section 60, subdivision *b* and Section sixty-seven, subdivision *e* need present none of the other requisites of federal jurisdiction.

Appellee refers to *Richardson* vs. *Shaw* (*209 U. S., 365*) as being an action like the present and states that it was brought to set aside an alleged fraudulent conveyance made by the bankrupt. This is incorrect. *Richardson* vs. *Shaw* was an action at law brought by a trustee in bankruptcy to recover preferences.

If a trustee has a year in which to apply for a writ of certiorari, appellee's argument that it was intended that he should have only thirty days to appeal from a decree in equity is hardly defensible.

The nature and manner of this appeal was brought up before the United States Circuit Court of Appeals in this case upon argument and briefs. The Circuit Court of Appeals was asked to make separate findings of fact and conclusions of law as provided by general order No. 36, § 3, if the appeal was pursuant to that order. It was held that this was an equity appeal governed by § 6, Chap. 8 (*a*) of the Judiciary Act.

To summarize: This is an equity case of which the District Court had jurisdiction by the amendment of 1903 to Section 67 (*e*) of the Bankruptcy Act. Being an equity case it was subject to the rules affecting all other equity cases, and the rights of appeal are the same as in all other equity cases, and the mere fact that the orig-

inal jurisdiction was conferred by an amendment to the Bankruptcy Act does not affect the subsequent treatment of the case as an equity case.

The case is not included within the list of cases specified in Section 6 where the right to appeal does not exist. That section is to be construed as it stands and Congress had the right by the amendment of 1903 to increase the equity jurisdiction in the federal courts so as to include such cases as that at bar.

The case then comes up on appeal precisely as if it involved the constitution or presented any other feature which entitled it to federal jurisdiction, and so long as the decision of the Circuit Court of Appeals is not made final by §6, the right to appeal under that section exists.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1920. No. 131.

EDWARD S. THOMAS, as Trustee in Bankruptcy of CHARLES I. LIGHTSTONE, Bankrupt,

Appellant,

vs.

SOL M. SUGERMAN,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR APPELLEE.

JOHN J. CRAWFORD,
Counsel for Appellee.

E. M. STERRY, PRINTER, 302-4 FULTON STREET, NEW YORK.

Supreme Court of the United States.

EDWARD S. THOMAS, as Trustee in Bankruptcy of Charles I. Lightstone, Bankrupt,
Appellant,

against

SOL M. SUGERMAN,
Appellee.

October Term, 1909.
No. 131.

BRIEF FOR APPELLEE.

Statement.

This is an appeal by the complainant from a decree of the Circuit Court of Appeals for the Second Circuit affirming a decree of the District Court for the Southern District of New York, which sustained a plea in bar interposed by the defendant Sugerman to the bill of complaint.

The action was brought by the appellant to set aside an alleged fraudulent transfer made by the bankrupt to the defendant. The property transferred consisted of outstanding accounts amounting to $47,197.61, for which the bankrupt received from the defendant $30,000. in cash (fols. 3-4). The appellee, by his plea in bar, set up as a defense that the appellant, with full knowledge of the facts, had prosecuted to judgment a proceed-

ing against the bankrupt requiring him to account for the proceeds of the transfer (fol. 19); and in passing upon the sufficiency of the plea, the District Court, by consent of the parties, considered the record in a proceeding to require the bankrupt to pay over to the trustee certain moneys alleged not to have been accounted for (fols. 47; 20-44).

In his petition in that proceeding, the trustee alleged, among other things, that in August, 1904, the bankrupt began cashing his outstanding accounts and from that source received $30,000, and that among the moneys which came into the hands of the bankrupt there was $30,000 received from the appellee (fols. 24, 26). And in alleging the amount of assets concealed by the bankrupt, the trustee included this $30,000 (fols. 26, 27). Upon the hearing before the referee, this money was considered as a part of the bankrupt's estate, and he was charged with the receipt of that sum (fols. 39, 39). The total for which he was required to account was $54,209, in which sum the $30,000 was included (*Id.*). Against this he was credited with $36,709, on account of various expenditures, and was ordered to pay over to the trustee, the balance, $17,500 (fols. 42, 43, 96). Upon the bankrupt's application to review the order of the referee, the trustee opposed the motion to reverse, and the order was affirmed (fol. 44).

Upon the facts so disclosed, the District Court sustained the plea (fols. 46-48), and this decree was afterwards affirmed by the Circuit Court of Appeals (fol. 65).

I.

The appeal should be dismissed because not taken in due time.

The record in this case discloses that the decree of the Circuit Court of Appeals from which this appeal is taken was filed and entered on the 18th of November, 1907 (fol. 66), and that the appeal was taken on the 17th of March, 1908 (fols. 69-70). If, therefore, the case is one to which General Order No. 36 applies, the appeal was too late, and should be dismissed (Conboy *v.* National Bank, 203 U. S. 141).

The language of that order is "Appeals *under the Act* to the Supreme Court of the United States from a Circuit Court of Appeals * * * shall be taken within thirty days after the judgment or decree." Now, what is an "appeal under the Act?" Does the term include only appeals taken in "bankruptcy proceedings" under Section 25 of the Act, or does it apply as well to appeals in "controversies arising in bankruptcy proceedings." where the jurisdiction depends upon Section 24.

The phrase "appeals under the act" is broad and comprehensive, and fairly and reasonably construed, would include an appeal taken in pursuance of any provision of the Bankruptcy Law. If the court had intended its rule to embrace only "bankruptcy proceedings" would it not have used words more significant of that intent? Would it not have said, "Appeals in bankruptcy proceedings," or "appeals under Section 25 of the Act"? If this was all that it had in mind, why did the court use such general terms? Moreover, the phrase "under the act" is substantially the same as that which the Court has so often construed,

as, for example, "cases arising under the laws of the United States," or "cases arising under the patent laws," or "under the criminal laws," etc., and it is fair to suppose that in formulating General Order No. 36, the court used the words in the comprehensive sense in which it has so frequently held that similar words were used by Congress. And there can be no reason for not giving to them their natural and ordinary import, unless it can be shown that the Act itself requires that they should be limited.

Section 24 of the Act provides that "The Supreme Court of the United States, the Circuit Courts of Appeals of the United States, and the Supreme Court of the Territories * * * are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases." But this bare grant of jurisdiction does not necessarily imply that the mode of procedure is to be that prescribed by the Act of 1891. If this had been the intention of Congress, would it not have said so? Would it not have used such words as "in the mode prescribed in other cases" or words of similar import? It is hardly probable that a matter so important as this would have been left to implication, when the legislative intent—if such had been that intent—could have been made clear by a half-dozen words. But the reason for the omission becomes obvious when we look at the context. Under the same Chapter heading—"Courts and Procedure Therein"—we find another section which declares that "all necessary rules, forms and orders *as to procedure* and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States" (Sec. 30). Is

it not the reasonable, indeed the necessary, inference from this that Congress intended that the procedure under section 24 should be prescribed by this Court? Construing the two sections together, it seems to be plain that Congress meant to do no more than confer the jurisdiction, and left the whole question of procedure, including the mode and time for taking appeals, to be regulated by this Court.

A comparison of the language used in section 24 with that used in section 25 will make it further manifest that this was the legislative intent. The section heading of section 24 is "Jurisdiction of Appellate Courts," while the heading of section 25 is "Appeals and Writs of Error." In the latter section, the mode of taking appeals is prescribed and regulated, from which it is apparent that the question of procedure was one which Congress considered. Why then is the language of the two sections so entirely different? If Congress meant in section 24 to prescribe the mode of procedure, why did it content itself with merely vesting jurisdiction? Why did it not follow the form used in section 25, and say: "Appeals may be taken in controversies arising in bankruptcy proceedings from the courts of bankruptcy to the Supreme Court of the United States and the Circuit Court of Appeals from which they have jurisdiction in other cases, and in the same manner," or use words of similar import? No explanation of this radical difference in phraseology seems reasonable, except the obvious one, that the whole subject of procedure under section 24 was to be provided for in the manner prescribed in section 30, viz. the rules and orders of this Court.

Moreover, to encourage appeals to this court in this class of cases by allowing a year in which to take them would not only operate to defeat one of

the objects of the Bankruptcy Act—expedition in the settlement of bankrupt estates—but it would be obnoxious to the spirit and policy of the Act of 1891. The primary purpose of the last mentioned act was to relieve this court, and to that end, the act excludes appeals as of right in the vast majority of cases. Even in the most important cases arising under the admiralty, patent, revenue and criminal laws, no such appeal is allowed. Now, with all this in mind, when the Bankruptcy Law was enacted, could Congress have intended to encourage appeals to this Court in trifling cases, merely because they happened to be "controversies in bankruptcy?" Before we impute such an intent, we should have better evidence of it than inferences and conjectures—something more tangible than mere implication.

The construction for which the appellee contends does no violence to the language of the act, and is not forced or strained; but gives to every word used by Congress its fair and ordinary import. Besides, it was a most natural and obvious thing for Congress to vest in this court the power to fix the time for taking appeals in all cases arising under the Bankruptcy Act. Many considerations of policy and convenience require that this should be so—not only to secure expedition in the settlement of bankrupt estates—but to protect the appellate courts from being over-burdened with business of this sort. To allow a year in which to appeal is certainly to encourage appeals, if for no other purpose than to secure delay. But why should it be supposed that Congress meant to encourage appeals in this class of cases, and especially appeals to this Court? If the present suit had been commenced in the State Court, it could not have been carried to the highest court

of the State, except by permission, or unless the judges of the intermediate appellate court should have disagreed. (New York Code of Civil Procedure Sec. 191; Frank *v.* Volkommer, 205 U. S., 521.) When the legislature of New York sought to relieve the Court of Appeals of that State from a condition similar to that which prevailed here when the Circuit Court of Appeals was established, it provided that in a certain class of cases the unanimous decision of the intermediate appellate court should be final, and in that class was included actions to set aside alleged fraudulent transfers. The reason is plain. Such cases rarely involve any new or difficult questions of law, and in nearly all of them the important question is one of fact. But if, as a class, they are not of sufficient importance to be appealable as of right to the highest court of a State, why should the time of this court be occupied with them? Yet if this appeal can be entertained, there is no reason why any trustee in bankruptcy may not appeal to this court whenever he can show that the suit is to set aside an alleged fraudulent transfer, that it involves more than one thousand dollars, that it was instituted in the United States District Court, and that an appeal from the judgment of the circuit court of appeals was taken within one year. With this case as a precedent, there can be little doubt but that the docket of this court would soon be clogged with such appeals. Can it be possible that Congress meant that trumpery cases, involving nothing more than the efforts of petty tradesmen to defeat the claims of their creditors, should be brought here with the same freedom as cases requiring a construction of the constitution? And is it conceivable that Congress could have intended to impose upon this court such a vast load

of trifling business, without any power in the court even to fix the time within which such appeals must be taken?

The courts have often said that one of the objects sought to be accomplished by the Bankruptcy Act was expedition in the settlement of bankrupt estates. But would it not greatly tend to defeat that object, if the times allowed for taking appeals like the present were the times mentioned in the Act of 1891? The defeated party might delay his appeal to the Circuit Court of Appeals for six months, and, after the case has been decided there, might wait a whole year before appealing to this court. Such procedure would, in most, if not in all, cases, be much less expeditious than the procedure in the State courts. If the present suit had been brought in the State court, the appeal to the Appellate Division must have been taken within thirty days, and, unless the judges of that court should have disagreed, there would have been no further appeal as of right (New York Code Civil Procedure, § 191; Frank *v.* Volkommer, 205 U. S. 521). Is it likely that Congress, when it vested the courts of bankruptcy with jurisdiction in this class of cases, meant to establish a mode of procedure so much more dilatory than that in the State courts? Before any such an intent is imputed, the court should have shown to it some provision in the act which, either expressly or by unavoidable implication, declares that the times for taking such appeals are those specified in the Act of 1891. But no such declaration can be found anywhere in the act, and this omission, coupled with the express power conferred upon this court to prescribe rules of procedure, would seem to require, not this implication, but the very opposite.

By Section 25 of the Act it is provided that

an appeal to the Circuit Court of Appeals from a judgment allowing or rejecting a debt or claim must be taken within ten days after the judgment appealed from has been rendered. But the pendency of a controversy arising in a bankruptcy proceeding may impede the settlement of the bankrupt's estate quite as effectually as the allowance or rejection of a claim. Why, then, should Congress have required appeals of the latter class to be taken in ten days and allow six months for those of the other sort? Why should such great haste be exacted in the one case and such dilatoriness permitted in the other? No good reason can be found for any such distinction, and if it existed, we could impute it to nothing better than oversight. But why import into the statute something that is not there when it is so obviously at variance with what is there? Why read into the act something that Congress has deliberately omitted, when the effect would be to make the enactment inconsistent and contradictory?

Nor is there anything in the decisions of this Court to warrant the construction contended for by the appellant. In *Hewitt* v. *Berlin Machine Works* (194 U. S. 296), the only question was one of jurisdiction, and the question whether General Order No. 36 applied was not involved or discussed. *Richardson* v. *Shaw* (209 U. S. 365) was in all respects an action like the present, viz., an action brought in the United States District Court by a trustee in bankruptcy to set aside an alleged fraudulent conveyance made by the bankrupt. The judgment of the District Court was, as in the case at bar, in favor of the defendant, and upon appeal by the trustee to the Circuit Court of Appeals this judgment was affirmed. The judgment of the Circuit Court of Appeals was entered in July, 1906, and in the following October

application was made to this court for a writ of *certiorari*, which was granted. But if an appeal or writ of error lay as a matter of right in that case, and the trustee had still nine months in which to perfect it, why was it necessary for the court to issue a *certiorari*? If such a right existed, then the action of the court in that case was supererogatory—a thing we cannot impute to this Court. But the facts of the two cases are identical, and if a writ of *certiorari* was the proper procedure there, then it was required here.

Doubtless, there may be, suits brought by trustees in bankruptcy, which will not be governed by the General Orders in Bankruptcy. If the trustee can show that the case is one within the judiciary acts, and not dependent at all upon the Bankruptcy Law, then he may rest his right of appeal solely upon the Act of 1891, and claim that an appeal taken within the time fixed by that Act is in good season. But that is because he can find the grant of jurisdiction outside of the Bankruptcy Act. If he is compelled to invoke that Act to support the jurisdiction, then his appeal is "under the Act," and regulated by such rules of procedure as this court may prescribe.

Now, upon what ground can the appellant in this case sustain the jurisdiction of this Court and the District Court? Certainly not upon anything to be found in the Acts relating to the judiciary. For what is the nature of the controversy? A suit to set aside a transfer alleged to have been made in fraud of creditors. And who are the parties? Persons who are citizens of the same State. How, then, is it brought within the jurisdiction of the Federal courts, and particularly, how could the District Court take jurisdiction? Why, merely because it is a case arising under the Bank-

ruptcy Law. Except for this fact, the Federal courts would be wholly without jurisdiction. In that Act, and in that Act alone, must be found the authority for every step taken in the suit. The mode of procedure, then, is not that mentioned in the Act of 1891, but that prescribed by the Bankruptcy Act itself, viz., the rules adopted by this Court in pursuance of the express authority to prescribe "all necessary rules as to procedure."

II.

In seeking to recover the proceeds of sale as a part of the bankrupt's estate, the complainant necessarily affirmed the sale, and hence he may not now proceed upon the theory that the sale was void.

The question of election was fully considered by this Court in *Robb* v. *Vos* (155 U. S., 13). In the opinion in that case the Court quoted with approval from *Connihan* v. *Thompson* (11 Mass., 270, 272, as follows: "The defence of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmance and the other upon the disaffirmance of a voidable contract or sale of property. In such cases, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties, once for all. The institution of a suit is such a decisive act; and if its maintenance necessarily involves an election, to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive

waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon." The Court also cited with approval the case of *Butler* v. *Hildreth* (5 Met., 49). In that case the assignee of an insolvent debtor had commenced an action against the vendee on a note given by him for the price of the goods sold. Afterwards, the assignee discontinued the action, and brought an action of trover alleging that the transfer was fraudulent. Chief Justice Shaw said: "We assume, for the purpose of this inquiry, that he had the right, in behalf of creditors, to set aside this conveyance, if in fact it was made to defraud creditors. But such a conveyance is not *ipso facto* void; it is valid as between the parties; it is binding upon the purchaser, and he could not avoid the payment of his notes on that account. It can be avoided only by the creditors, or one representing creditors. But circumstances may be such, that it may not be for his interest to avoid such sale, but on the contrary to affirm it. Suppose the fraudulent character of the transaction consisted in this, that the debtor intended to sell his goods, and the purchaser to buy them for the express purpose of preventing an immediate attachment, by substituting for goods open to attachment, promissory notes not capable of attachment. Should these notes afterwards come into the hands of an assignee, it might be more beneficial for the creditors, to collect the notes, which would affirm the sale, than to disaffirm the sale and repudiate the notes. The assignee has an *election,* not of remedies merely, but of rights. But an assertion of one is necessarily a renunciation of the other."

In *Sickman* v. *Abernathy* (14 Colo., 174) the members of an insolvent firm transferred all their assets for the sum of $15,000, and took in payment three notes of the pur-

chasers for $5,000 each. Certain creditors then commenced proceedings against the firm for goods sold, and the vendees were served as garnishees. It was held that these creditors could not afterwards claim that the sale was fraudulent as to them. The Court said: "At the time of the sale and transfer of the assets of the defendants to the garnishees, the attendant circumstances and relation of some of the parties were such, perhaps, as to raise a doubt in regard to the honesty of the transaction sufficient to have caused an investigation by the creditors, which might have been had under proper proceedings; and, if found fraudulent, the sale could have been set aside, and the entire property in the hands of Sickman & Davy, subjected to the payment of the debts, or, if found best, the sale could have been affirmed, and provision made for the application of the entire proceeds to the payment of the debts. But no such course was taken. The creditors, instead of questioning the honesty of the sale, acquiesced, treated it as legitimate, and elected to proceed against the purchasers for money supposed to be due. By the course pursued, the sale and transfer of the assets of the firm to the garnishees was ratified."

Hathaway v. *Brown* (22 Minn., 214) was an action for the wrongful taking and conversion of a stock of goods, sold by one Mills to the plaintiff, and taken from the latter's possession by the defendant Brown, as sheriff, by virtue of executions against Mills in favor of the other defendants. The defense interposed was that the sale to plaintiff was in fraud of the creditors of Mills. At the trial, the plaintiff introduced evidence tending to prove that, in part payment for the goods in question, he had conveyed to Mills certain

real estate, and that some of the defendants, with knowledge of the fact and of the circumstances attending the sale, had caused the land so conveyed to be levied on and sold under their execution against Mills. Held, that the defense was good. The Court said: "Conceding the fraudulent character of the sale as to the creditors of Mills, it was voidable, but not absolutely void. It was competent for them to elect either to avoid it *or to affirm it by pursuing the property which their debtor acquired in exchange for that which he sold. They could not do both.*"

So, in *Millington v. Hilt* (47 Ark. 301), it was said: "When any creditor with knowledge of the wrong that has been done him, makes his election to take from the grantee the purchase price agreed to be paid for the land, his conduct is, in effect, an affirmance of the sale and a waiver of the right to complain of the fraud."

See also

Iron Gate Bank *v.* Brady, 184 U. S. 665.

W. W. Brice Ltd. *v.* Hutchins, 205 U. S. 340.

Furness *v.* Ewing, 2 Pa. St. 479.

Cunningham *v.* Campbell, 3 Tenn. Ch. 708.

Butler *v.* O'Brien, 5 Ala. 316.

Lemay *v.* Bibean, 2 Minn. 251.

Fowler *v.* Bowery Savings Bank, 113 N. Y. 450.

Reunich *v.* Bank of Chillicothe, 8 Ohio, 529.

Scarf *v.* Jardine, L. R. 7 App. Cas. 345.

It is also well settled that the election is de-

termined by the commencement of the proceeding, and not by the result.

Robb *v.* Vos, 115 U. S. 13.
Matter of Garver, 176 N. Y. 386.
Lowenstein *v.* Glass, 48 La., Ann. 1422.
Smith *v.* Gilmore, 8 App. Cas. (D. C.) 192.
Thensen *v.* Bryan, 113 Iowa, 496.
Sherman *v.* Watt, 104 Mich., 201.
Ludington *v.* Patton, 111 Wis., 208.

Now, how do these rules apply to the present case? When the appellant entered upon his duties as trustee, he learned that the bankrupt had transferred to the defendant certain accounts, and had received from the defendant $30,000 in cash. The appellant then had the right to do one of two things; he could treat the sale as void, and claim the accounts as a part of the bankrupt's estate, or he could affirm the sale and claim the proceeds. But, obviously, the accounts and the money paid for them could not both belong to the estate. Which should it be? This was for the appellant to decide, and he had to make a choice.

And did he not make a choice? He took a proceeding for the purpose of compelling the bankrupt to turn over certain assets belonging to the estate, and which he alleged the bankrupt was concealing. And in his petition in that proceeding he set forth that the accounts had been transferred to the appellee; that the bankrupt had received $30,000. therefor; *that this was a part of the bankrupt's estate,* and was wrongfully withheld by the bankrupt; and he procured a judgment in which this money *was included in the estate for which the bankrupt was required to ac-*

count. That the proceeds of sale constituted a part of the estate was the gist of the proceeding and the essence of the decision. The finding of the referee is: "In August, 190[illegible], he [the bankrupt] received on outstanding accounts the sum of $30,000." (fol. 38) and all through the proceeding this money was treated as a part of the estate for which the bankrupt must account, and in arriving at the amount which the bankrupt was found to be concealing, this money was placed among the debits. Moreover, the total amount charged against the bankrupt, including this $30,000., was $54,209, while he was allowed $36,709, which he claimed to have paid out, and the total he was found to be concealing was only $17,500, so that except for the sum received from the appellee the decision must have been in the bankrupt's favor. Now, as the trustee brought this proceeding and procured this decision, with full knowledge of the facts—for this is the allegation of the plea—why does it not amount to an election? Is it not wholly inconsistent with an intent to do otherwise than affirm the sale?

One of the tests applied in cases of election is whether the two actions could be prosecuted at the same time (Fowler *v.* Bowery Savings Bank, 113 N. Y. 450, 454-455). Apply that test to this case. Could the appellant have prosecuted this suit on the theory that there was no sale, and at the same time have proceeded against the bankrupt upon the theory that the $30,000. received by him was a part of his estate wrongfully withheld from the complainant? Two proceedings more plainly inconsistent it would be difficult to imagine. The claim put forth in the one would be destructive of that asserted in the other. If the attempted sale was a nullity, on what ground could the money paid by the defendant be a part

of the bankrupt's estate? And on the other hand, if the money paid by the bankrupt and withheld by him was a part of his estate, how could the thing for which this money had been paid belong to that estate? As the complainant could not be entitled to both the thing transferred and the price paid, he had to decide what it was that he would claim as the estate. Was it the accounts? or was it the proceeds of the sale? He had to choose one or the other, and it was this deliberate choice between two inconsistent rights that made the election.

And at the time that the proceeding against the bankrupt was commenced, the appellant had good reason to affirm the transfers. The appellee had advanced $30,000. in cash on accounts amounting to $45,000., that is to say, 66 2/3 per cent. of their face value; and as appears by his answer, he has never been able to collect more than $31,548.35 thereon. Now, the appellant might have seen that some of the accounts were uncollectible, and that others could be collected only with difficulty and expense, and in his eyes, at that time, the $30,000. cash might have looked like a better asset than the accounts. And very likely he would have been quite content with his choice, if the proceeding against the bankrupt had resulted in obtaining more of the money. But while the fact that the bankrupt had squandered or successfully concealed the money might be good ground for putting him in jail, it affords the appellant no reason for changing his position and disaffirming a transfer that he had previously affirmed.

Counsel for the appellant quote from *Bowditch v. Page* (153 N. Y. 104). But they do not give the context. Had they done this, it would readily be seen that the language of the court, considered in the light of the facts before the Court, is not fair-

ly susceptible of the construction that counsel would put upon it. The case was an action for conversion brought by the assignee for the benefit of the creditors of M. & L. Allison, against a bank and the sheriff for taking certain goods under an execution against Isaac Allison, who had been the original owner of the goods, and had given a mortgage thereon to M. & L. Allison, and had delivered possession of the goods to the assignee. The latter had previously obtained a judgment against Isaac Allison and under that judgment had caused *the interest of Isaac Allison* in the goods—whatever that interest might have been—to be sold. The court held that this was not an election, since the sale was only of his interest, and, at most, operated as a foreclosure of his possible equity in the property. The intimation, then, that the assignee was not in a position to elect was merely *obiter*. But it will be noticed that the judge writing the opinion had in mind no such case as the present. He was speaking of different remedies intended to reach the *same property*, and of an election which would work a forfeiture of the vested interests of the beneficiaries in the very same property that he had tried to reach by another proceeding. But cases of that sort are very different from those where a trustee has a choice, not merely between remedies, but between properties; between the thing sold and the price.

Moreover, it is well settled that persons acting in a fiduciary capacity may be bound by their election between inconsistent remedies. Thus an executor may be bound by his election (*Fowler v. Bowery Savings Bank*, 113 N. Y., 450) or a receiver (*Fitts v. Beardsley*, 8 N. Y. Supp., 567) or an assignee for the benefit of creditors (Butler *v.* Hildreth, 9 Metc., 49).

Counsel for the appellant say that it was the appellant's duty to get in the estate. Well, that is conceded. But in discharging that duty, he had to decide what it was that constituted the estate, or, at least, what it was that he would claim as the estate. He could demand the money from the bankrupt, or the accounts from the appellee, but the claim that the money constituted assets was inconsistent with any assertion of title to the accounts. If the sale was in fact fraudulent, the appellant had the right to treat it as a nullity, and claim the accounts themselves as a part of the estate; but when he showed to the court that the sale had been made, and demanded the proceeds as assets of the estate, he necessarily affirmed the sale.

Counsel for appellant also urge that the decision of the Circuit Court of Appeals will embarrass trustees in bankruptcy in their efforts to collect the assets of the estate. But how can this be? The decision amounts to no more than this—that where a trustee, with full knowledge of all the facts, institutes and prosecutes to judgment a proceeding to reach the consideration paid a bankrupt for a transfer of property, he may not afterwards disaffirm the sale and recover the thing for which this consideration was paid. This is the rule that applies to everybody else who is *sui juris*, and the appointment of a man as trustee in bankruptcy hardly places him apart from all other men to be exempt from rules of law to which the rest of the world is required to conform.

It must be obvious that the rule for which the appellant contends would work great hardships. The creditors have rights and equities, it is true, but so have other persons. Where a man has purchased goods from one who afterwards fails, is he never to be secure in his position? May the trustee

consume months or years in an attempt to collect the proceeds from the bankrupt, and then, having failed in this because those proceeds have been lost or squandered by the bankrupt, turn about and attempt to disaffirm the sale? If this were the rule, no one who had bought goods of a bankrupt could know where he stood until the bankruptcy proceedings should be terminated, and the trustee discharged. It might be very convenient for the creditors that a trustee or assignee could both approbate and reprobate, but such a rule would be very hard upon everybody else.

III.

The judgment should be affirmed.

JOHN J. CRAWFORD,
Counsel for Appellee.

HOMAS, AS TRUSTEE IN BANKRUPTCY OF LIGHTSTONE, *v.* SUGARMAN.

PEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 131. Argued April 12, 1910.—Decided May 31, 1910.

here the trustee in bankruptcy brings a bill in equity in the Circuit Court to set aside a transfer made by the bankrupt, the appeal is not governed by § 25 of the Bankruptcy Act but by the Court of Appeals Act of March 3, 1891, c. 517, § 6, 26 Stat. 828. *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545.

e rule that an act of election directed toward a third person may operate *in rem* and establish title as to all concerned, does not apply, where, as in this case, the title is in the person enforcing the remedies, and there was no element of election.

e fact that a trustee in bankruptcy obtained a money judgment against one to whom the bankrupt transferred certain assets to delay and defraud creditors, *held*, in this case, not to have amounted o ratification of the bankrupt's act or to an election not to pursue he assets transferred, but the bankrupt was entitled to also maintain a bill in equity to set aside the transfer.

7 Fed. Rep. 669, reversed.

THE facts are stated in the opinion.

Mr. Abram I. Elkus and *Mr. Carlisle J. Gleason* for pellant:

The proceedings upon which the plea in bar is based re merely possessory in character and were an attempt the part of the trustee to get that possession of propy held by the bankrupt to which he was entitled under e Bankruptcy Act.

When the trustee qualified all the property of the nkrupt vested in him and he was entitled to possession ereof. The bankrupt was under the legal duty of de-

livering to him all assets, irrespective of their source. Bankruptcy Act, § 70.

The bankrupt could not assert an outstanding title in anyone else as against his trustee. *Re Beall*, Fed. Cas. No. 1156; *Re Vogel*, Fed. Cas. No. 16,982; *Matter of Moses*, 1 Fed. Rep. 865; *In re Smith*, 100 Fed. Rep. 795.

The trustee took the property subject to all the rights of third parties, and in the same condition in which the bankrupt had it. *Re N. Y. Economical Printing Co.*, 110 Fed. Rep. 514.

The turn over order is not a judgment or decree for the payment of money against the bankrupt, but a mere order for delivery of assets to the trustee. It is merely an assertion of possessory rights. *Re Schlesinger*, 102 Fed. Rep. 117.

Under § 70, as to possession, the trustee undoubtedly stands in the shoes of the bankrupt, but as to rights against fraudulent transferees he is clothed with the powers of a creditor.

The acts of the trustee in the proceedings upon which the plea in bar is based were not irreconcilable with the bringing of a suit against Sugarman to set aside the fraudulent transfer.

The doctrine of election of remedies applies only where the remedies asserted are irreconcilable. 15 Ency. of Law and Pro., 257, 261; *Mills* v. *Parkhurst*, 126 N. Y. 89, 93; *Matter of Garver*, 176 N. Y. 386.

The trustee did nothing which will bar the claims of creditors. *Bowdish* v. *Page*, 153 N. Y. 104, 110; *Butler* v. *Hildreth*, 5 Metcalf, 49.

Where the act relied upon as constituting an election is that of the representative of creditors, a distinct and clear case within the doctrine of election must be made out because the rights of creditors, ignorant of the facts, are in question.

It is apparent that no equitable estoppel is involved in

this case. The trustee took no steps and was guilty of no omission upon which Sugarman could in the least rely, or which could in the slightest degree tend to affect his actions or even his beliefs. *Jenness* v. *Berry*, 17 N. H. 549; *Robbins* v. *Worten*, 128 Alabama, 373, 379; *Woods* v. *Potts*, 140 Alabama, 425.

Not one of the appellee's authorities supports his contention that there has been an election by the trustee in bankruptcy in the case at bar.

There could be no election under the allegations of the bill of complaint.

Sugarman had full knowledge of the fraudulent intent and insolvent condition of the bankrupt, etc., and had no right of action against the trustee and no right of action against anyone else by reason of the fraudulent transfer. He was *in pari delicto* with the bankrupt and the court would leave him where it found him. *Wheeler* v. *Sage*, 1 Wall. 518; *Selz* v. *Unna*, 6 Wall. 327; *Railroad Co.* v. *Sutter*, 13 Wall. 517; *Mullen* v. *Hoffman*, 174 U. S. 639; *Goodrich* v. *Houghton*, 134 N. Y. 115.

Sugarman being actually fraudulent, would not be entitled, upon final judgment against him for the property transferred, to have credit for the money he had paid the vendor. *Lynch* v. *Burt*, 132 Fed. Rep. 417; *Johnson* v. *Forsyth*, 127 Fed. Rep. 845; *Burt* v. *Gotzian*, 102 Fed. Rep. 937; *Baldwin* v. *Short*, 125 N. Y. 553, 559, 560; *Fowler* v. *Deering*, 9 App. Div. 220; *Conde* v. *Hall*, 92 Hun, 335.

Under the fraudulent conspiracy charge in the complaint, the bankrupt and Sugarman are jointly and severally liable to the trustee. The pursuit of one and the gaining of judgment against him where that judgment is not satisfied would not bar action against the other. *Watts* v. *British Co.*, 60 Fed. Rep. 483; *Lovejoy* v. *Murray*, 3 Wall. 1; *Russell* v. *McCall*, 141 N. Y. 437; *Osterhaut* v. *Roberts*, 8 Cow. 43; *Preston* v. *Hutchinson*, 29 Vermont, 144.

This court has jurisdiction of the appeal. It is from a final decision of the Circuit Court of Appeals in a suit in equity involving more than $1,000, besides costs. It is taken within one year under § 6 of the Judiciary Act of March 3, 1891, c. 517, § 6, 26 Stat. 828, and is not a case where decision of the Circuit Court of Appeals is final under § 6.

Mr. John J. Crawford for appellee:

The appeal should be dismissed because not taken in due time. General Order No. 36 applies. *Conboy* v. *National Bank*, 203 U. S. 141; *Hewitt* v. *Berlin Machine Works*, 194 U. S. 296. General Order No. 36 was not involved or discussed. *Richardson* v. *Shaw*, 209 U. S. 365, came up on certiorari and does not apply.

In seeking to recover the proceeds of sale as a part of the bankrupt's estate, the complainant necessarily affirmed the sale, and nence he may not now proceed upon the theory that the sale was void. *Robb* v. *Vos*, 155 U. S. 13; *Connihan* v. *Thompson*, 11 Massachusetts, 270, 272; *Butler* v. *Hildreth*, 5 Metc. 49; *Sickman* v. *Abernathy*, 14 Colorado, 174; *Hathaway* v. *Brown*, 22 Minnesota, 214.

When any creditor with knowledge of the wrong that has been done him, makes his election to take from the grantee the purchase price agreed to be paid for the land, his conduct is, in effect, an affirmance of the sale and a waiver of the right to complain of the fraud. *Millington* v. *Hill*, 47 Arkansas, 301. See also *Iron Gate Bank* v. *Brady*, 184 U. S. 665; *W. W. Bierce, Ltd.*, v. *Hutchins*, 205 U. S. 340; *Furness* v. *Ewing*, 2 Pa. St. 479; *Cunningham* v. *Campbell*, 3 Tenn. Ch. 708; *Butler* v. *O'Brien*, 5 Alabama, 316; *Lemay* v. *Bibean*, 2 Minnesota, 251; *Fowler* v. *Bowery Savings Bank*, 113 N. Y. 450; *Reunich* v. *Bank of Chillicothe*, 8 Ohio, 529; *Scarf* v. *Jardine*, L. R. 7 App. Cas. 345.

The election is determined by the commencement of

the proceeding, and not by the result. *Robb* v. *Vos*, 115 U. S. 13; *Matter of Garver*, 176 N. Y. 386; *Lowenstein* v. *Glass*, 48 La. Ann. 1422; *Smith* v. *Gilmore*, 8 App. D. C. 192; *Thensen* v. *Bryan*, 113 Iowa, 496; *Sherman* v. *Watt*, 104 Michigan, 201; *Ludington* v. *Patton*, 111 Wisconsin, 208.

The rule for which the appellant contends would work great hardships. The creditors have rights and equities, it is true, but so have other persons. Where a man has purchased goods from one who afterwards fails, he must at some time be secure in his position. The trustee cannot consume months or years in an attempt to collect the proceeds from the bankrupt, and then, having failed in this because those proceeds have been lost or squandered by the bankrupt, turn about and attempt to disaffirm the sale.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by a trustee in bankruptcy to set aside a transfer of accounts and bills receivable made by the bankrupt to the defendant Sugarman with intent to delay and defraud creditors. Sugarman pleaded in bar that the plaintiff had ratified his dealings because, with knowledge of all the facts, the plaintiff had taken a judgment against the bankrupt for $17,500, a part or all of which was money remaining in the bankrupt's hands of $30,000 alleged by the bill to have been paid to him by Sugarman in pursuance of the fraudulent scheme. A majority of the Circuit Court of Appeals held the ratification made out, on the ground that, to get the judgment, the trustee had to rely upon a right inconsistent with that now set up. 157 Fed. Rep. 669; *S. C.*, 85 C. C. A. 337. The plaintiff appealed to this court.

It is argued that the appeal was too late because not taken within thirty days after the decree, as required by

General Orders in Bankruptcy No. 36, for appeals under the act. But this is not an appeal under the act, § 25, by authority of which the General Order was adopted, and is not governed by that order. The appellate jurisdiction is under or is the same as that under the Court of Appeals Act of March 3, 1891, c. 517, § 6, 26 Stat. 828. *Knapp* v. *Milwaukee Trust Co.*, March 7, 1910, 216 U. S. 545. The appeal was taken within a year and was in time.

On the merits we are of opinion that the decision was wrong. We are quite ready to assume what the court below was at some trouble to establish, that an act of election directed toward a third person may operate *in rem* and establish title as to all parties concerned. But the demand of the trustee on the bankrupt, even when enforced by a resort to the courts and by judgment, had no element of election about it. The legal title to the money had been in the bankrupt, and was transferred by the statute to the trustee, § 70. He was entitled to have that money in his hands as against the bankrupt in any event, whether he decided to hand it back to Sugarman or to distribute it in dividends. The law had put him in the bankrupt's shoes with additional powers. Therefore to insist that the bankrupt should do what the statute required him to do was as consistent with a subsequent rescission of the bankrupt's fraudulent acquisition of title as with an affirmance of it. It had no relation to that question, except possibly to put the plaintiff in a position better to decide it.

Decree reversed.